In the

SUPREME COURT of the UNITED STATES

October Term, 1978

No. 77-1535

DAVID C. HEILMAN,

Appellant,

vs.

A & M RECORDS, INC.,
a California Corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant, David Heilman, appeals from the Order of the Supreme Court of the State of California entered on January 26, 1978, in which the Court denied his Petition for Hearing. With that Order the Supreme Court of California affirmed the creation of a national copyright under the California law of unfair competition.

OPINIONS BELOW

The Order of the Supreme Court of the State of California denying Heilman's Petition for Hearing is not reported. This Order, however, affirmed the decision of Court of Appeal of the State of California, Second Appellate District, which decision has been reported as *A & M Records, Inc. v. Heilman* at 75 Cal. App.3d 554 (1977), and at 142 Cal. Rptr. 390 (1977). The decision of the Court of Appeal had affirmed the decision and judgment of the Superior Court of the State of California, County of Los Angeles. Copies of the Order of the Supreme Court of California, the decision of the Court of Appeal, and the Superior Court's Order granting Summary Judgment, Findings of Fact and Conclusions of Law, Judgment and Order to Amend Judgment, are found in the Appendix to this Jurisdictional Statement.

JURISDICTION

The Supreme Court for Los Angeles County found Heilman liable on theories of conversion, unjust enrichment and unfair competition. Judgment was rendered against him in the amount of $136,027.82. Heilman appealed this decision and judgment to the Court of Appeal, Second Appellate District, State of California. The Court of Appeal affirmed the Superior Court. Heil-

man petitioned for hearing before the California Supreme Court. The Supreme Court denied his petition. The Notice of Appeal to the Supreme Court of the United States was filed with the California Supreme Court and the California Court of Appeal, Second Appellate District, on April 14, 1978. A copy of the Notice of Appeal and the Affidavit of Service of the notice are found in the Appendix.

The jurisdiction of this Supreme Court of the United States to review the decision of the Supreme Court of California by direct appeal is invoked pursuant to 28 U.S.C. §1257(2). Cases supporting the Court's exercise of its jurisdiction in this case are, *Market Street R.R. Co.* v. *Railroad Commission*, 324 U.S.548 (1945); *Lathrop* v. *Donahue*, 367, U.S.820 (1961); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S.282 (1921).

QUESTIONS PRESENTED

1. Does the decision of the California Supreme Court, which affirmed the award of damages based on Appellant's profits without regard to the national distribution of the sales generating the profits, violate the United States Constitution, and in particular the Commerce Clause, Supremacy Clause and Copyright Clause of that Constitution?

2. Does the decision of the California Supreme Court, which affirmed the broad injunction of Appellant's advertising in California, in national publications, which advertising is essential to the conduct of a nationwide mail order business, violate the United States Constitution, and in particular the Commerce Clause and the First Amendment to that Constitution?

3. Does the decision of the California Supreme Court, which affirmed state regulation of an exclusive right in sound recordings, conflict with the compulsory license provisions of the federal copyright statutes?

4. Did the decision of the California Supreme Court, which affirmed the denial of Appellant's choice of attorneys for his corporation, E-C Tape Service, Inc., without a hearing on the attorney's qualifications, deny the Appellant his right to that due process of law which is secured to all citizens by the Fourteenth Amendment of the United States Constitution?

5. Did the decision of the California Supreme Court, which affirmed punitive sanctions against Appellant, despite the fact that he had violated no court order, deny Appellant his right to the due process of law secured by the Fourteenth Amendment?

6. Did the decision of the California Supreme Court, which affirmed the calculation of punitive damages based on Appellant's supposed ability to litigate this and related actions, improperly penalize Appellant's assertion of his right to due process of law?

CALIFORNIA STATUTES INVOLVED

Cal. Civil Code § 3333:

Breach of obligation other than contract

For the breach of an oblitation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

Former Cal. Civil Code § 3369 1.-3.

§ 3369. [Relief not granted to enforce penalty, forfeiture or penal law: Exceptions: Unfair competition enjoinable: Definitions : Who may prosecute actions]

1. Neither specific not preventive relief can be granted to enforce a penalty or forfeiture in any case, not to enforce a penal law, except in a case of nuisance or unfair competition.

2. Any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction.

3. As used in this section, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, untrue or misleading advertising and any act denounced by Business and Professions Code Sections 17500 to 17535, inclusive.

Cal. Business & Professional Code § 17200-17203 (Cal. Civil Code § 3369 1.-3. as amended and renumbered by Ch. 1005, § 1, Cal. Stats. 1976, and ch. 299, § 2, Cal. Stats. 1977)

§ 17200. Definition

As used in this chapter, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

§ 17201. Person

As used in this chapter, the term person shall mean and include natural persons, corporation, firms, partnerships, joint stock companies, associations and other organizations of persons.

§ 17202. Specific or preventive relief

Notwithstanding Section 3369 of the Civil Code, specific or preventive relief may be granted to enforce a penalty, forfeiture, or penal law in a case of unfair competition.

§ 17203. Remedies and jurisdiction

Any person performing or proposing to perform an act of unfair competition within this state may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the

appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

Cal. Civil Procedure Code § 2019(b)(2)

(2) Notwithstanding Section 1989, the court may, upon motion on 10 days' written notice and for good cause shown, make an order requiring a deponent who is a party to the record of any civil action or proceeding or is a person for whose immediate benefit said action is prosecuted or defended or is at the time of the taking of the deposition an officer, director or managing agent of any such party or person to attend a deposition at a place more than 150 miles from the residence of such deponent. In granting or refusing such order, the court shall consider whether the moving party selected the forum, whether the deponent will be present at the trial, the convenience of the deponent, the suitability of discovery through a deposition by written interrogatories or other discovery methods, the number of depositions sought under this section, the expense to the parties of requiring the deposition to be taken within 150 miles of the residence of the deponent, the whereabouts of the deponent at the time the deposition is scheduled to be taken, and all other factors tending to show whether or not the interests of justice and the convenience of the parties and witnesses will be served by requiring the deponent to appear for his deposition at a place more than 150 miles from his residence. Such order may

provide that the party desiring to take such deposition shall pay the reasonable expenses incurred by the deponent in attending such deposition and that he furnish an undertaking approved by the court to secure such payment and may contain such other terms and conditions as are equitable and just.

Cal. Civil Procedure Code § 2034

[In Appendix]

STATEMENT OF THE CASE

The Appellant, David Heilman, has at all times material to this case been the President of Economic Consultants, Inc. (E-C Tape), a Wisconsin Corporation. Heilman and E-C Tape engaged in the manufacture and nation-wide sale of sound recordings. To this end single play records were purchased of various kinds of music which had been released during the period 1929 to February 15, 1972, and assembled into classes based on type of music and original issuance date. (E-C Tape's products are described best in its advertising. See Clerk's Record at pp. 1142-1155.) These groupings then were used to produce a unique master recording which subsequently was used for the production of discs, cartridge tapes, cassette tapes and reel-to-reel tapes, each of which was equivalent to a full play album. (Clerk's Record p.54.)

Heilman recognizes that some persons call his business tape piracy. However, unlike others engaged in manufacturing or marketing recordings they did not originally produce, Heilman has made no attempt to capture the profit potential of current popular songs and music.

Instead, Heilman and E-C Tape utilized almost exclusively older recordings whose appeal is based on other than fad or fancy. (See Clerk's Transcript at pp. 1142-1155.) Many of the performers in the recordings used by Heilman, such as Judy Garland, Duke Ellington and Billie Holiday, are deceased and unavailable for further original live recordings. In order to maintain a viable business, Heilman and E-C Tape have relied on their ability to recombine the old recordings into new and original, popular formats and useful media, such as eight track or cassette tapes.

They have relied almost exclusively on advertising in national magazines in order to present to a nation-wide public the lists of the recordings that are available, and to distribute easy to use mail order forms. One such magazine is In Touch, published by Touch, Inc. of Chicago. (See Clerk's Record at p. 245 et seq.) The list of magazines utilized is extensive and varied and includes even the American Bar Association Journal. (Clerk's Record at p. 54.) The cost of such advertising is described at various points in the record. Appellant's wife, Barbara Heilman, testified that the cost of one national ad, in TV Guide, cost $102,000.00. (See Trial Transcript at pp. 712-791 passim.) In the period 1972 through 1974 E-C Tape made 2.2 million dollars in gross sales, spending approximately 1.0 million on advertising. (Clerk's Transcript at pp. 678-680.) (Other figures on costs are set forth at pp. 1225 et seq., Clerk's Record.)

Heilman and E-C Tape made or tendered all payments required by the compulsory license provisions of the federal statutes. (See Former 17 U.S.C. § (1)(e), now 17 U.S.C. § 115 as enacted by Pub. L. 94-553, 90 Stat.

2541.) (Clerk's Record at pp. 1105-1141.) Many of the tendered payments unilaterally were rejected by Harry Fox, an agent for the major publishing houses, on the ground that Appellant did not have a license to use the performances. (E.g., Clerk's Record at p. 1104.) Since Heilman and E-C Tape's products were unique and original they qualified for and were accorded compilation copyrights pursuant to 17 U.S.C. § 7 (now 17 U.S.C. § 103). (Clerk's Record at p. 815.)

E-C Tape, though a party below, did not pursue an appeal through the California courts and is not a party to the present appeal. The Appellee, A & M Records, Inc., (A & M), is a major recording company.

After the Superior Court granted summary judgment on the issue of liability to A & M, six days of trial before the Court, sitting without a jury, were held on the damage issue. The Court made Findings of Fact and Conclusions of Law favoring A & M (App. p. 28), and rendered judgment against E-C Tape and Heilman in the amount of $136,027.82. (App. p. 23.)

Heilman was found liable on theories of unjust enrichment, conversion and misappropriation, based on E-C Tape's unauthorized duplication of A & M's sound recordings. The source of A & M's cause of action was identified by the Court of Appeal as Cal. Civil Code § 3369. (App. p. 12.) Heilman was held to be personally liable because the corporation was his alter ego. (App. pp. 44, 46.)

In determining A & M's damages the Court arrived at the figure of $74,000.00, which represented an approximation of E-C Tape's gross profits on the sales of A & M's recordings. (App. p. 36.) The Court did not require any showing that these sales had occurred in California, or that they were connected with any occurrence in California. When, at the end of the trial, it suddenly appeared that the Superior Court was not going to require any such proof from A & M, Counsel for E-C Tape objected, basing his opposition on this Court's decision in *Goldstein* v. *California*, 412 U.S.546 (1973). Counsel also requested an opportunity to offer such proof for E-C Tape and Heilman, but this request was denied. (Trial Transcript at pp. 883-886.) Notwithstanding that four accountants employed by A & M had spent four days sifting through E-C Tape's business records, A & M presented no evidence regarding the location of any of the sales. This left the Superior Court with only one alternative, if damages were to be awarded: it had to assume the power to award damages without regard to geographic location. (App. p. 40.) The Court assumed that power, and ruled that the burden was on E-C Tape and Heilman, as the Defendants, to prove that the sales were not made in California. (App. p. 40.)

E-C Tape and Heilman had available abundant evidence of the location of their sales, including the records used to prepare the mailing labels. These records, stored on magnetic tape for computer retrieval purposes, identified each sale with an address. (Trial Transcript at pp. 338-339.) The computer, however, was not programmed to print out sales broken down by geographic area, but the same thing could have been done manually, albeit at great expense, time and effort, after all the records

had been printed by a computer printer. (Clerk's Record at p. 997.) The Court's ruling, which caught Heilman and E-C Tape by surprise, was extremely prejudicial. Had Heilman anticipated this ruling, that A & M would not be required to prove the elements necessary to recover damages against him, he could have limited A & M's recovery of damages to about seven percent of the amount awarded in the final Judgment in this case. (This was the approximate percentage of E-C Tape's sales in California, compared to its national sales.) (Clerk's Record p. 680).

On appeal this action by the Superior Court was affirmed on the basis that, notwithstanding A & M's action clearly was premised on an unauthorized duplication of its recordings, *Goldstein v. California*, 412 U.S. 546, did not apply. This ruling was not proper because it exceeded California's power, and also because the extremely harsh damage rules applied conflicted with federal rules.

The Superior Court completely refused to permit any deduction for Appellant's costs of using A & M's recordings. (App. p. 40.) After arriving on the figure of $74,000.00, the Superior Court rounded it off to $80,000.00, based on an indication that some recordings containing A & M's songs may have been sold after April 30, 1975, the last date covered by A & M's "evidence" of damages. (App. p. 36.) This was a pure guess by the Court, not based on any evidence.

The court said that the Defendants had not met their burden of showing their costs. (App. p. 40.) Heilman and E-C Tape, however, had presented extensive evidence

of their costs and expenses, especially their advertising costs. As noted above, during one period Appellant's advertising costs were approximately 1.0 million dollars as compared to 2.2 million in gross sales' revenues during that same period. Heilman's wife, on direct examination, testified extensively regarding advertising costs. She testified that E-C Tape spent about 40% of its gross revenues on advertising before being enjoined from doing so. (See Trial Transcript at p. 712, et. seq.) (Other figures on costs were shown at p. 1244, Clerk's Record.) Indeed, the Superior Court expressly instructed Counsel for E-C Tape that evidence on costs could be limited because the Court would rely on the Defendants' tax returns as showing costs and expenses. (Trial Transcript at pp. 726-727.) Later, however, this evidence was completely disregarded because one accountant testifying for A & M said he could not tell whether E-C Tape's records were complete, even though the accountant neither suggested nor demonstrated any inaccuracy or inconsistency in the records. (Clerk's Transcript at pp. 1296, App. p. 34.)

The Court also refused to consider this evidence because it related to all E-C Tape's sales, and not just to the sale of recordings containing A & M's songs. (App. p. 35.) The Court did not allocate these expenses on the same proportional basis as it had done with respect to A & M's calculation of gross profits, instead refusing to allow any deduction at all.

The Superior Court awarded punitive damages in the amount of $50,000.00. In awarding punitive damages the Court rejected Heilman's net worth figures, which had been offered by A & M, and, instead, punished E-C

Tape and Heilman because they were represented by counsel in various litigation involving their recording business. (App. p. 38.) This ruling made an example of Heilman. (App. p. 41.)

The Superior Court awarded injunctive relief against E-C Tape and Heilman's advertising. This injunction applied to nationwide publications orginating from outside of California. (App. pp. 25-26.) The injunction made it impossible for Appellant to utilize his customary and most effective method of advertising. He no longer can advertise in any publication that might be distributed in California.

Heilman's further arguments before this Supreme Court are based on the following facts. On November 24, 1975, the Superior Court precluded him from testifying at trial regarding certain matters concerning which he had refused to testify when his deposition was taken. (See App. pp. 49-50.) At the time, Heilman had refused to testify based on his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. No order requiring Heilman to testify had been issued, nor was any hearing held on the legitimacy of his claim.

On the same day, the application of Attorney Thomas M. Kells to be admitted as counsel pro hac vice on behalf of E-C Tape was denied because Heilman would not agree to allow Attorney Kells to defend him personally, but would only agree to the appointment of Kells as counsel for the corporation. The Court having conditioned its granting of the application on Heilman's waiver of his right to defend himself in pro per, the application was denied without more. (App. p. 30.)

In addition to the action in the California courts that now is before this Supreme Court on appeal, David Heilman is a defendant in a like action that presently is pending before the Circuit Court for Milwaukee County, Wisconsin, in which action A & M is a member of the Plaintiff class. *Mercury Record Productions, Inc.* v. *Economic Consultants, Inc.*, Case No. 405-986 (Cir. Ct. Milwaukee County, Wis., commenced Dec., 1972). See *Mercury Record Productions, Inc.* v. *Economic Consultants, Inc.*, 64 Wis.2d 163, 218 N.W.2d 705 (1974), cert. denied, 420 U.S. 914 (1975). He also is the Plaintiff in an action in which he is seeking a declaratory ruling concerning application of the compulsory license provisions of 17 U.S.C. § 1(e), and an injunction against criminal prosecution. *Heilman v. Bell*, 434 F. Supp. 565 (E.D. Wis.), appeal docketed, No. 77-1968, 7th Cir., Sept. 26, 1977. And he is the Defendant in a criminal action that has been commenced by the Attorney General. *United States* v. *Heilman*, Case No. 77-CR-323. (N.D. Ill., filed Mar., 1977).

ARGUMENT

I. *THE FEDERAL QUESTIONS RAISED ARE SUBSTANTIAL: THE DECISIONS OF THE CALIFORNIA COURTS CREATE A NATIONAL COPYRIGHT BASED ON STATE LAW.*

The principle questions in this case relate to the Copyright, Supremacy and Commerce clauses of the United States Constitution. *Goldstein* v. *California*, 412 U.S. 546, demonstrates that these issues are substantial. In another case, *Edward P. Marks Music Corp.* v. *Colorado Magnetics, Inc.*, 497 F.2d 285 (10th Cir. 1974), cert.

denied, 419 U.S. 1120 (1975), this Court invited comment from the Solicitor General regarding the interpretation of the compulsory license provisions of the federal copyright statutes, which issue is again presented in this case.

The decision in this case involves an interstate business. The California law of unfair competition has been interpreted to permit the California courts to award damages without regard to the location of Heilman's business or the place of its sales. This ruling ignores completely the Court's holding in *Goldstein* v. *California*, 412 U.S.546.

The *Goldstein* decision itself, which found the unauthorized use of recordings was a matter of a local concern must be reconsidered in light of the proliferation of regulation in the field among 49 state governments. Moreover, the recent revision of the copyright statutes, Pub. L. 94-553, 90 Stat. 2541 (October 19, 1976) clearly demonstrates that the subject is one of national importance. The role of the states in light of these changed facts is a significant federal question.

In this case the California Courts have enjoined Heilman and E-C Tape from advertising in any magazine that is distributed in California, without regard to the place of origin of the magazine or its national distribution. This makes it impossible for Heilman to carry on his business and in effect imposes California's law of unfair competition on the nation. This ruling raises substantial questions left unanswered by this Court in *Head* v. *New Mexico Board of Examiners*, 374 U.S.424 (1963). These questions must be considered in the light of this Court's determinations that commercial speech is entitled

to a substantial measure of protection under the First Amendment. E.g., *Bigelow* v. *Virginia*, 421 U.S.809, 818 (1974).

Finally, the questions involved in this case are significant because they demonstrate that the entire proceeding in this case has been one in which concern for the record industry has lead to neglect of David Heilman's fundamental rights.

II. *THE CASE IS PROPERLY WITHIN THE APPELLATE JURISDICTION OF THE COURT.*

Section 1257, 28 United States Code, provides, in part:

> "Final judgments or decrees rendered by the highest court of a state in which decision could be had may be reviewed by the Supreme Court as follows:
>
> ....
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity".

The denial of Appellant's petition for hearing on review of the final Judgment of the Superior Court of Los Angeles County is the final word on this litigation from the Supreme Court of California. It is reviewable on appeal by this Court. *Market Street R.R.* v. *Railroad Commission*, 324 U.S. at 551.

Section 1257(2) also is satisfied with respect to the

"statute of any state" requirement. As this Court has said, that provision is not limited to technical statutory enactments of a legislature, but covers state determinations which are effectively legislative in nature. *Lathrop* v. *Donahue*, 367 U.S. at 824.

There is little question that the damages award against Heilman, without regard to the geographic area of his business, and without regard to the effect of such relief on interstate commerce, effectively creates a state copyright power. Whether this power is founded in California common law, or under California Civil Code sections 333 and former 3369, as decided by the California Court of Appeal, it is in derogation of Congress' authority under the Commerce Clause of the United States Constitution. Even though they may be constitutional on their face, the California courts' application of these statutes in this case raises a substantial federal question. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. at 289-290.

III. *THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION ON THE MERITS WITH BRIEFS AND ORAL ARGUMENT.*

A. *The Action of the California Courts Violates the United States Constitution As Construed By This Court in Goldstein.*

In *Goldstein* v. *California*, 412 U.S. at 556, 558-561, the power of a state to create exclusive rights in the nature of a copyright was limited to its own borders. Notwithstanding this, in the case at hand the California courts have assumed the power to prohibit mail order

sales which occur outside of California, merely because the tape product is mailed to California. The California courts have asserted a right to control sales which have not been shown to have any connection whatsoever with California. This violates the Copyright Clause of the United States Constitution since the power to create a national copyright is granted only to the Congress. It violates the Commerce Clause in that it clearly is not limited to the state's power to regulate commerce within the state. Inasmuch as these constitutional enactments are the Supreme law of the land, the California courts' action violates the Supremacy Clause.

Moreover, the rules applied by the California courts in computing damages under this nationwide copyright directly conflict with federal law. Under 17 U.S.C. § 504(b) a person found to have made an unauthorized use of a copyrighted property expressly is allowed a deduction for his costs.

In this case, Heilman and E-C Tape's revenues were due primarily to their marketing efforts, and only secondarily due to the use in part of A & M's recordings.. There is no reason for allowing a copyright owner such as A & M, who is unable or unwilling to prove any loss of profits due to an alleged infringement of its copyright, to recover the profits generated by the infringer's advertising. The advertising expenses, as an element of overhead, would clearly be an allowable credit to E-C Tape and Heilman under federal law. *Sammons* v. *Colonial Press*, 126 F.2d 341, 351 (1st Cir. 1942).

B. *The Injunctive Relief Granted By The California Courts Violates The Commerce Clause And The First Amendment.*

The injunction clearly prohibits Heilman from advertising in any publication which is distributed in California. This order infringes on the free trade of commercial information as an element of commerce, which is protected by the Commerce Clause. *Great Atlantic & Pacific Tea Co.* v. *Cottrel*, 424 U.S.366, 370-371 (1976). It also violates the First Amendment, which protects the free flow of information both among the states and within them. In particular, this Court has found that commercial speech, such as E-C Tape and Heilman's advertising, is included within the First Amendment's protection. *Bigelow* v. *Virginia*, 421 U.S. at 818; *Virginia Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S.748, 756-757, 761 (1976).

Even assuming that California's common law of unfair competition can lawfully be applied to E-C Tape and Heilman's mail order sales to California residents, that would not justify the state in making all national publications distributed in California unavailable to them. Such an injunction is not limited in its effect to just those copies actually disseminated in California; its effect is to bar the advertising in question from those publications in every state.

The California courts had many less oppressive alternatives available to them, such as requiring that a disclaimer be included in E-C Tape's advertising that would be distributed in California. The advertising already carried a limited disclaimer stating that the offer was not

valid where prohibited by state law (Clerk's Transcript at pp. 1142-1155), and a more specific disclaimer would simply and effectively have eliminated the potential for sales to California residents.

If the order of the California courts is not facially invalid, it calls for a weighty and delicate balancing of the competing interests which this Court should undertake with the assistance of briefs and oral argument from the parties.

C. *Appellant's Activity Was Protected By The Compulsory License Provisions Of Former 17 U.S.C. § 1(e).*

Heilman and E-C Tape tendered all payments required by the compulsory license provisions of former 17 U.S.C. § 1(e). In enacting this statutory provision the Congress did not intend to allow the states to give recording companies the right to deny use of the underlying copyrights. Yet, the determination of the California courts in this case has the effect of permitting just that.

The payment or offer to pay the compulsory fee creates an express license under the federal statutes to use the underlying copyright in all forms of mechanical reproduction. Any other interpretation of the compulsory license provisions creates irrational inconsistencies in the treatment of compositions as compared to mere recordings under the federal statutes. *Capitol Records* v. *Mercury Records Corp.*, 221 F.2d 657, 664-665 (2d Cir. 1955) (L. Hand, J., dissenting).

David Heilman and E-C Tape have briefed and argued this issue extensively before the Seventh Circuit Court of Appeals. Rather than reargue the issue here, Appellant urges the Supreme Court to retain jurisdiction of this case until it can determine whether either party will appeal from that Court's decision so that the issue can be considered in both cases, with the benefit of briefs and oral argument by counsel.

D. *The Supremacy Clause Of The United States Constitution Protects Appellant's Sales Of His Copyrighted Compilations.*

The granting of composition copyrights to E-C Tape and Heilman's compilations demonstrates they are of national importance, to be regulated by the federal government and not by the states. The Copyright statutes which grant this protection under the Supremacy Clause override California's law of unfair competition.

E. *The California Court Denied Appellant His Constitutionally Secured Rights Under the Fourteenth Amendment When It Denied The Application Of Attorney Thomas Kells To Be Admitted Counsel Pro Hac Vice.*

Since Heilman's liability was based on the liability of his corporation, E-C Tape, the prejudice to the corporation's defense was prejudicial to Heilman. The denial was clearly erroneous, without the holding of a hearing on Mr. Kells' qualifications, and based only on Heilman's refusal to waive his right to defend himself personally. See *Flynt* v. *Leis*, 434 F.Supp. 481, 484 (S.D. Ohio 1977).

F. *The California Courts Abridged Appellant's Constitutionally Secured Rights Under The Fifth And Fourteenth Amendments When They Excluded His Testimony Because He Earlier Had Asserted His Constitutional Right Against Self-Incrimination.*

Heilman's reason for asserting his rights under the Fifth Amendment is not uncertain. He was at the time being investigated by federal law enforcement officers. This investigation eventually lead to a criminal indictment. This is not a case in which a party has failed to appear for the taking of his deposition, or has appeared and refused to answer any and all questions. This is a case in which a party has appeared and raised a clearly substantial claim of a constitutionally protected privilege.

The rule in both the federal courts, Fed. Rules Civ. Proc. 37, 28 U.S.C., and in California, see Cal. Civil Proc. Code, § 2034, allows the imposition of sanctions, but only after a motion to compel discovery has been granted and disobeyed, *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13, 18-19 (E.D.Pa. 1970), affirmed 438 F.2d 1187 (3rd Cir. 1971.) A motion to compel discovery, not a motion for sanctions is the proper remedy when a question of privelege is raised. *Fox* v. *Studebaker-Worthington, Inc.*, 516 F.2d 989, 994-995 (8th Cir. 1975). The procedure approved by the California courts in this case imposes a subsfantial threat to a party's assertion of his constitutional privilege against self-incrimination.

The requirement of a hearing and an order compelling discovery, before sanctions are imposed, allows a party at least the opportunity to weigh the prejudice to

his civil dispute against his right not to testify against himself, and to make a reasoned decision regarding his course of action, before sanctions are imposed. Moreover, at the hearing the Court may determine that the party's right to assert the privilege outweighs his opponent's need for discovery, or that a protective order is necessary and appropriate.

David Heilman's right to due process of law and his constitutionally secured privilege against self-incrimination have been abridged by the actions of the California courts in this case. The procedural balance to be struck between the constitutionally secured rights asserted by Heilman and the policies behind pre-trial discovery pose a substantial federal question requiring plenary consideration by this Court.

G. *The California Courts Penalized Appellant For Seeking Court Determinations Of His Disputes.*

Heilman's right to use the machinery established by law for the resolution of disputes is secured by the Due Process Clause of the Fourteenth Amendment, *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971). The Superior Court in this case expressly made his exercise of this right a basis for awarding punitive damages against him. While the Court had discretion to award punitive damages, such power clearly was abused when the exercise of a civil right became a consideration for its award of those damages. Furthermore, Heilman's ability to defend himself in the courts does not warrant the conclusion that, therefore, he is financially able to pay punitive damages. Nothing is known about the cost of that litigation, or the source of the funds used to meet that cost, or

even whether or not his attorneys were being paid. The courts of California have no right to punish Heilman for resorting to the courts in order to settle his disputes, nor is his exercise of his rights in this regard a proper consideration in awarding punitive damages. What happened to David Heilman in this case raises a substantial federal question concerning due process of law.

CONCLUSION

For the reasons stated above, David Heilman asks that the United States Supreme Court exercise its jurisdiction in this case and reverse the Judgment entered against him in the Superior Court for Los Angeles County and affirmed by the California Appeal Court and Supreme Court. In the alternative, he asks that this Court remand the case with instructions that the Judgment be set aside and a new trial be granted, one that comports with the requirements of due process of law. If the proper mode of review of this case is by writ of certiorari, it is requested that this appeal be treated as a petition for writ certiorari pursuant to 28 U.S.C. § 2103, and that the petition be granted.

Respectfully Submitted,

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APPENDIX

INDEX TO APPENDIX

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

2d District, Division 3, Civ. No. 48806

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

A & M RECORDS INCORPORATED

vs.

HEILMAN

Mosk, J., did not participate.

Appellant's petition for hearing DENIED.

/s/ Bird
Chief Justice

Certified For Publication
In The Court Of Appeal Of The
State Of California
Second Appellate District
Division Three

A & M RECORDS, INC., A California corporation, Plaintiff and Respondent,

v.

DAVID L. HEILMAN, Defendant and appellant.

2D CIV NO. 48806 Sup. Ct. No. C 80979.

APPEAL from a judgment of the Superior Court of Los Angeles County. Julius M. Title, Judge. Affirmed.

David L. Heilman in propria persona.

Mitchell, Silberberg & Knupp, Howard S. Smith, Russell J. Frackman and David S. Gubman for Plaintiff and Respondent.

Defendant, David L. Heilman, appeals from a judgment which: (1) incorporated the terms of an order permanently enjoining him from duplicating, advertising, shipping, or transporting within the State of California magnetic tapes or disc phonograph records embodying any part of any recorded performance sold by A & M Records, Inc., without the consent of A & M Records, Inc., and (2) decreed an award of $136,027.82 damages and costs in favor of A & M Records, Inc.[1] The appeal

[1] The injunction restrains Economic Consultants, Inc. as well as Heilman and the damage award was entered against defendants, Economic Consultants, Inc. and Heilman jointly and severally. Economic Consultants, Inc. has not appealed, however, and the judgment is final as to it.

lies. (See Code Civ. Proc., §904.1, subd. (a).)

Heilman contends that: (1) the trial court should have declined to exercise jurisdiction over this case; (2) summary judgment was improperly granted on the issue of his liability; (3) sanctions were improperly imposed in connection with discovery; (4) the injunctive relief granted conflicts with the Commerce Clause, the Copyright Clause, and the First Amendment to the United States Constitution; and (5) the basis for and calculation of damages were improper.[2]

We have examined these contentions and hold each of them to be without merit. Therefore we will affirm the judgment of the trial court.

FACTS[3]

A & M Records, Inc. (hereafter A & M Records) is a California corporation which commercially manufactures and sells recorded musical performances in the form of disc phonograph records and prerecorded magnetic tapes. Heilman has admitted advertising and selling record and tape "albums" which included performances of songs duplicated from recordings manufactured by A & M Records without making payments to A & M

[2] Heilman's contentions are set forth in greater detail in the discussion which follows. Certain additional unmentioned contentions of his have also been considered and have been determined to be without merit.

[3] We construe the facts in the light most favorable to A & M Records, Inc. as the prevailing party below. (See *Hasson* v. *Ford Motor Co.*, 19 Cal.3d 530, 544.)

Records or to any of the musicians involved.[4]

Heilman is the founder of Economic Consultants, Inc., now known as E-C Tapes, Inc. and doing business as E-C Tape Service (hereafter E-C Tapes). He made all major decisions respecting E-C Tapes' operations, including those at issue in this case.

In the latter part of 1971 Heilman and E-C Tapes began the business of advertising and selling pirated records and tapes. Records and tapes containing 16 selections were compiled for sale as "albums." Fifteen recorded performances owned by A & M Records[5] were duplicated and included without authorization in various albums sold by E-C Tapes. All of these performances were initially "fixed"[6] by A & M Records and the recordings first sold to the public prior to February 15, 1972.

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[4] The unauthorized duplication of recordings is commonly known as "record piracy" or "tape piracy." (*Goldstein v. California* (1973) 412 U.S. 546, 549-550 [37 L.Ed. 2d 163, 169-170] *Capitol Records, Inc.* v. *Erickson*, 2 Cal. App. 3d 526, 528, fn. 2; Nimmer on Copyright (1976) §108.4621, pp. 431-432.)

[5] The recorded performances owned by A & M Records and duplicated by E-C Tapes were entitled; "This Guys In Love With You;" "Close To You;" "We've Only Just Begun;" "Do You Know What I Mean;" "Wild World;" "It's Too Late;" "You Were On My Mind;" "Guantanamera;" "Whiter Shade of Pale;" "Look Of Love;" "Ticket To Ride;" "Superstar;" "Moon Shadow;" "Hello Hello;" and "A Man and A Woman."

[6] "A sound recording is 'fixed' when the complete series of sounds constituting the work is first produced on a final master recording that is later reproduced in published copies." (37 C.F.R. § 202.15A, subd. (b).) Since the recordings here involved were fixed and sold prior to February 15, 1972 they are not protected under federal copyright law, but are valid objects of state protection. (See *Goldstein* v. *California*, *supra*, 412 U.S. at pp. 552, 570 [37 L.Ed.2d at pp. 171, 181].) The Copyright Act of 1976 has no effect on the rights here in issue. (Pub.L. 94-553, § 101 (1976), 90 Stat. 2572.)

From 1971 through the middle of 1975 E-C Tapes made gross sales from pirated recordings of approximately $4,300,000. Gross receipts from the sale of albums, which included pirated recorded performances owned by A & M Records, were at least $729,337.11. On the basis of the percentage of A & M Records owned performances contained on the albums sold, E-C Tapes obtained gross receipts from the sale of pirated A & M Records' performances of at least $80,000.

Heilman personally received at least $200,000 from the total piracy operations. In addition, E-C Tapes paid many of his personal expenses including paying for his apartment, car, and personal telephone.

E-C Tapes did not keep books or records breaking down sale of albums by geographical area. It was established, however, that substantial manufacturing operations were carried on in the State of California. The "master" recording and metal parts used to produce disc phonograph records of pirated recordings for sale to the general public, including those here in issue, were manufactured in California as well as a substantial number of the record discs themselves and the labels made for the records.

During the course of the proceedings in this case E-C Tapes twice, and Heilman once personally, violated the temporary restraining order and preliminary injunction issued by the trial court and were therefore adjudged in contempt of that court. An effort was made by Heilman to evade the restraining order and preliminary injunction in this case by, among other things, requiring customers in California to provide out-of-state addresses for "trans-

shipment." In addition, Heilman and E-C Tapes violated injunctions issued against them by courts of the State of Wisconsin restraining them from engaging in record or tape piracy.

Defendant's operations were moved into the State of Illinois, where record piracy was illegal as well, but substantial record and tape piracy was nevertheless conducted. In May 1975 the Federal Bureau of Investigation executed a search warrant in Illinois and seized a substantial portion of E-C Tapes' pirated recordings. But the record piracy operations were again commenced and were still operating at the time of trial.

DISCUSSION

1. *Forum Non Conveniens*

On the eve of trial on the issue of damages, after a summary judgment establishing Heilman's liability had been granted and discovery had been completed to the extent possible, Heilman moved to dismiss or stay the proceedings pursuant to the doctrine of forum non conveniens. The motion was denied. He contends that this ruling was an abuse of the trial court's discretion.

We disagree. Though Heilman did not designate for inclusion in the clerk's transcript any of the papers relating to this motion, it is clear from the record that the trial court acted within its discretion. As noted in part earlier A & M Records is a resident plaintiff, substantial manufacturing operations related to the record piracy at issue were carried on within the State of California and many of the relevant transactions occurred here. (See

Thomson v. *Continental Ins. Co.*, 66 Cal.2d 738, 742-747.)[1]

2. *Summary Judgment*

Heilman asserts that the partial summary judgment on the issue of his liability was improperly granted. Specifically he contends that: (a) the trial court did not consider his affirmative defense that A & M Records was involved in an illegal "tying arrangement" in violation of the Sherman Anti-trust Act, and (b) there could be no summary judgment on the issue of liability for unfair competition because it had not been established that Heilman "palmed off" his products as A & M Records' products.

A. *Affirmative Defense*

A recorded performance embodies two distinct bundles of legal rights: (1) rights in the musical composition itself, the tune and lyrics, and (2) rights in the recording "fixing" the performance of that musical composition. (Copyright Act of 1909 (17 U.S.C. § 1, subds. (e) and (f) (amendment added by public law 92-140 (1971)), § 5, subds. (e) and (n) (amendment added by public law 92-140 (1971)); § 12, § 101, subd. (e), as amended by public law 92-14 (1971)); *Heilman* v. *Levi* (E.D. Wis. 1975) 391 F. Supp. 1106, 1108-1110; Nimmer on Copyright (1976 §§ 17, 35, 108.4621, pp. 73, 146.3-146.4, 432.) Re-

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[1] A & M Records asserts that review of the denial of a motion to dismiss for inconvenient forum may be only by mandamus. We believe that this assertion is incorrect in light of Code of Civil Procedure section 410.30, subdivision (b). (See 1 Witkin, Cal. Procedure (1977 pocket supp.) Jurisdiction, § 260, p. 262.)

corded performances, however, cannot exist without the right to reproduce mechanically the underlying musical compositions. Early in this century it was recognized that if composers had an unlimited right to control the "mechanical reproduction" of musical compositions there was a danger of "establishing a great musical monopoly" in the mechanical reproduction of music. (H.R. Rep. No. 2222, 60th Cong. 2d Sess. (1909) p. 6.) Congress therefore incorporated into the 1909 Copyright Act a comprehensive plan to recognize the rights of composers yet "prevent the establishment of a great trade monopoly." (*Id.* at p. 9.)

A key element of this plan is the compulsory licensing provision. (*Id.* at pp. 6-9.) Once the owner of a copyrighted musical composition permits one recording to be made of a performance of that composition, the right to record that composition becomes non-exclusive and all persons may make "similar use" of the musical composition, provided they comply with the statutory requirements. (Copyright Act of 1909 (17 U.S.C. § 1, subd. (e)); Nimmer on Copyright (1976) § 108.3, pp. 420-421.)

Heilman asserts that the Harry Fox Agency, apparently the representative of the owners of the compositions involved, prevented his complying with the statutory requirements by refusing his tender of the statutory royalties. He contends that this conduct constitutes an affirmative defense because it was a monopolistic illegal tying arrangement. According to Heilman, "[t]he publisher of the underlying composition is simply saying to the re-re[c]order, you must *buy* a license from the owner of the performance before I will grant you a license for the words and music."

There is significant authority, however, that record

piracy is not the "similar use" permitted by the compulsory license provision of the Copyright Act. (See *Heilman* v. *Levi*, *supra*, 391 F.Supp., and the cases cited therein at p. 1110.) The logic of these cases has been criticized. (See Nimmer on Copyright (1976) § 108.4621, pp. 431-434.3.) But even assuming the correct rule is that the owners of the copyrights to the compositions should have accepted the tender of royalties, the only result of this assumption would be that Heilman would have a defense to a copyright infringement action brought by the owners of the copyright in the musical compositions. A & M Records' action against Heilman for duplicating without consent *performances* embodied in A & M Records' recordings is independent of any action that the owners of the underlying compositions might bring against Heilman for copyright infringement. In short, Heilman's so-called "affirmative defense" is irrelevant to A & M Records' unfair competition claim. (See *Fibreboard Paper Products Corp.* v. *East Bay Union of Machinists*, 227 Cal.App. 675, 728-729.)

B. *Unfair Competition*

Heilman asserts that the summary judgment granted on the issue of his liability should be reversed because there remains a triable issue as to whether his actions constituted "palming off" of A & M Records' product. (See Code Civ. Proc., § 437c.) He contends that in order to show unfair competition it must be established that his action constituted "palming off."

As previously noted, Heilman has admitted, however, that without authorization he duplicated performances owned by A & M Records in order to resell them for

profit. This conduct presents a classic example of the unfair business practice of misappropriation of the valuable efforts of another. Such conduct unquestionably constitutes unfair competition, even if there is no element of "palming off." (Civ. Code, § 3369, subd. (3); *Barquis* v. *Merchants Collection Assn.*, 7 Cal. 3d 94, 108-113; *Capitol Records, Inc.* v. *Erickson, supra*, 2 Cal.App.3d at pp. 536-538; Annot., Unfair Competition By Direct Reproduction of Literary, Artistic, or Musical Property, 40 A.L.R.3d 566, 569-572, 578-580.)

3. *Discovery Orders*

A & M Records duly noticed Heilman to produce certain documents in Milwaukee, Wisconsin, on October 22, 1975 (some six weeks before the scheduled date of trial)..His deposition there was also duly noticed for two days later. Heilman failed to produce any of the documents and also refused to answer any questions of substance on the constitutional ground that his answers might tend to incriminate him. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15.)

In response to this conduct the court ordered that "[d]efendants Economic Consultants, Inc. and David L. Heilman are precluded from introducing at trial any documents listed in plaintiff's Notice to Appear at Trial and Notice to Produce Documents at Trial filed November 7,. 1975 which they have not heretofore produced or which they do not produce at office of plaintiff's counsel in Los Angeles by 4:00 P.M. on November 26, 1975. Defendant David L. Heilman is precluded from testifying at trial respecting matters [*sic*] questions respecting which he refused to answer at his deposition on October 24, 1975."

Heilman was apparently able to comply substantially with this order insofar as production of documents prior to trial was concerned. The order precluding Heilman from testifying at trial respecting matters upon which he had refused to answer questions in discovery was interpreted by the trial judge as limiting the scope of Heilman's testimony only, and not that of any other witness.

Heilman argues nevertheless that these orders were improper. He contends both that the court could not make such orders without his first disobeying a court order and that these two orders constituted an abuse of discretion. We disagree.

A. *Failure to Produce*

The order employed in response to Heilman's failure to produce certain documents in discovery was a conditional order. It only prevented him from introducing these documents at trial if he, contrary to the court's order, once again failed to produce them in Los Angeles by 4:00 p.m., November 26, 1975, approximately a week before the scheduled start of the trial.

When a party disobeys an order to produce documents "the court may make such orders in regard to the refusal as are just." (Code Civ. Proc., § 2034, subds. (a) and (b)(2).) So long as the penalty is appropriate to the dereliction and does not exceed the protection required to protect the interests of the party entitled to but denied discovery, its imposition is within the discretion of the trial judge. (*Stein* v. *Hassen*, 34 Cal.App.3d 294, 301; Thompson, *Sanctions in California Discovery* (1968) 8

Santa Clara Law 173 at p. 186.) Given the facts of this case and the imminent date of trial the court's action was appropriate, just and within its discretion.

B. *Preclusion of Testimony*

This is a case where the trial court was confronted by the "difficult problem" of a civil defendant who faces possible criminal prosecution involving the same facts as the civil action. (Cf. *People* v. *Coleman*, 13 Cal.3d 867, 884-885.) On the one hand matters which are privileged are outside the scope of discovery and a court may not make an order compelling an individual to make responses which that person reasonably apprehends could be used in a criminal prosecution of him or which could at the least lead to evidence that might be so used. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15; Code Civ. Proc., § 2016, subd. (b); Evid. Code, § 930; *Maness* v. *Meyers* (1974) 419 U.S. 449, 464 [42 L.Ed.2d 574, 587]; *Black* v. *State Bar*, 7 Cal.3d 676, 685.) On the other hand the enactment of the Discovery Act of 1957 was intended to take the "game element" out of trial preparation and do away with surprise at trial. (See *Greyhound Corp.* v. *Superior Court*, 56 Cal.2d 355, 376.) The accomplishment of this purpose compels the court to prevent a litigant claiming his constitutional privilege against self-incrimination in discovery and then waiving the privilege and testifying at trial. Such a strategy subjects the opposing party to unwarranted surprise. A litigant cannot be permitted to blow hot and cold in this manner. (Cf. *Campain* v. *Safeway Stores, Inc.*, 29 Cal.App.3d 362, 365-366; see *International Tel. & Tel. Corp.* v. *United Tel. Co. of Fla.* (M.D.Fla. 1973) 60 F.R.D. 177, 186; *Securities & Exch. Com'n* v. *American*

Beryllium & Oil Corp. (S.D.N.Y. 1969) 303 F.Supp. 912, 921.)

The action taken by the trial court was a fair and just resolution of the problem. It was not an abuse of discretion. Heilman was precluded from testifying at trial only on matters upon which he had asserted in discovery his privilege against self-incrimination. He was not prevented from testifying concerning matters as to which he had been forthcoming nor was he prevented from presenting documentary evidence or the testimony of other witnesses to support his defenses.

Heilman does not claim that the trial court's order was an inappropriate "juristic consequence" of his assertion in discovery of his constitutional privilege against self-incrimination. (See *Shepard* v. *Superior Court*, 17 Cal.3d 107, 116-117; *Baxter* v. *Palmigiano* (1975) 425 U.S. 308, 318 [47 L.Ed.2d 810, 821].) As previously noted, though, he does assert that the court could not take such action against him without his first disobeying a court order. (See Code Civ. Proc., § 2034, subd. (b)(2).)[8]

But Code of Civil Procedure section 2019, subdivision (b)(1) provides with respect to depositions that "the court may make any order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." This section grants the court the power to protect the deposing party as well as the party deposed from oppression — here the oppression that

[8] Were Heilman correct in this assertion a trial court would be rendered powerless to deal with the situation. Since a court may not issue an order compelling incriminating testimony, there could be no court order for Heilman to disobey.

would flow from a waiver at trial of the privilege against self-incrimination that had been asserted to block discovery.[9] (See *Thoren* v. *Johnston & Washer*, 29 Cal.App.3d 270, 274.) This interpretation is consistent with federal practice based on comparable provisions. (4A Moore's Federal Practice (2d ed. 1975) § 37.05, fn. 14, pp. 37-95 through 37-96.)

4. *Injunctive Relief*

Heilman contends that the portion of the injunctions restraining him in the State of California from advertising albums for sale which included selections duplicated from recordings sold by A & M Records: (a) violated the Commerce Clause to the United States Constitution (U.S. Const., art. I, § 8, subd. (3)) because it interfered with advertising on a national level; (b) violated the Copyright Clause to the United States Constitution (U.S. Const., art. I, § 8, subd. (8)) because it enjoined advertisements copyrightable under the Federal Copyright Act; and (c) violated his First Amendment rights (U.S. Const., 1st Amend.) by enjoining commercial speech. These contentions will be discussed seriatim.

[9] We note also that Civil Code section 2019, subdivision (b)(1) provides in the following language for the imposition of monetary sanctions if such sanctions are deemed justified: "In granting or refusing such order the court may impose upon *either party* or upon the witness the requirement to pay such costs and expenses, including attorney's fees, as the court may deem reasonable." (Emphasis added.) This language supports the interpretation that the subdivision applies to both parties.

A. *Commerce Clause*

All injunctive relief against Heilman was carefully circumscribed to restrain only Heilman's activities in, or aimed at, California. But it is Heilman's contention that the injunctions violate the Commerce Clause by interfering with Heilman's national advertising.

There is no question, however, that state action to encourage and protect intellectual and artistic efforts is a legitimate exercise of local police power. (*Goldstein* v. *California*, *supra*, 412 U.S. at pp. 555-559 [37 L.Ed.2d at pp. 173-175].) Exercise of such power is not improper merely because it affects interstate commerce in some way. (*Head* v. *Board of Examiners* (1963) 374 U.S. 424, 429 [10 L.Ed. 2d 983, 988].) It will be found to place an undue burden on interstate commerce only if it: (1) discriminates against interstate commerce, or (2) operates to disrupt its required uniformity. (*Id.* at p. 429 [p. 988]; *Huron Portland Cement Co.* v. *Detroit* (1960) 362 U.S. 440, 448 [4 L.Ed.2d 852, 859].)

Here it has not been suggested that the injunction discriminates against interstate commerce per se or that such restraint would not be applied to "any person" who so engaged in unfair competition within the State of California. There is also no basis for concern over disrupting national uniformity, where, in this area of unfair business practices, the similarity of federal and state law itself indicates both a common purpose and the lack of any conflict with national policy. (See *People ex rel. Mosk* v. *National Research Co. of Cal.*, 201 Cal.App.2d 765, 776-777; *Allied Artists Pictures Corp.* v. *Friedman*, 68 Cal.App.3d 127, 137; see also Copyright Act of 1909 (17 U.S.C. §§ 1, 101(e), 104) (as amended by public law

92-140 (1971)) sections which were in effect at all times relevant to injunctive relief in this case.) The injunctions do not violate the Commerce Clause.

B. *Copyright Clause*

Heilman contends that the State of California cannot "control" his advertisements because they were copyrightable under federal law. But Heilman was enjoined from advertising his products in California because the sale of his products in California was illegal unfair competition. The challenged injunction was not an attempt to regulate imitation of copyrightable advertisements. Nothing in the copyright law prevents California from restricting the solicitation of such illegal transactions. (See *Pittsburg Press Co.* v. *Human Rela. Comm.* (1973) 413 U.S. 376 [37 L.Ed.2d 669]; contrast *Jacobs* v. *Robitaille* (D.C. New Hamp. 1976) 406 F.Supp. 1145, 1151-1153.)

C. *First Amendment*

Heilman contends that the injunctions against him are unconstitutional, as it is now recognized that commerical speech is included in that category of speech which receives First Amendment protection. (See *Va. Pharmacy Bd.* v. *Va. Consumer Council* (1976) 425 U.S. 748, 762 [48 L.Ed.2d 346, 358].) But prohibition of the solicitation of transactions which constitute illegal unfair competition raises a very different question than would the prohibition of dissemination of truthful and legitimate commercial information. (*Linmark Associates, Inc.* v. *Willingboro* (1977) 431 U.S. 85, 98 [52 L.Ed.2d 155, 165]; *Pittsburg Press Co.* v. *Human Rela. Comm.*, *supra*,

413 U.S. at pp. 388-389 [37 L.Ed.2d at pp. 678-679].) An injunction may be imposed to forbid advertisements which propose such illegal transactions. (*Ibid.*; *Bigelow* v. *Virginia* (1974) 421 U.S. 809, 828 fn. 14 [44 L.Ed.2d 600, 615 fn. 14]; *Va. Pharmacy Bd.* v. *Va. Consumer Council*, *supra*, 425 U.S. at p. 759 [48 L.Ed.2d at p. 357]; *Carey* v. *Population Services International* (1977) ____ U.S. ____ [52 L.Ed.2d 675, 694].)

5. *Damages*

Heilman contends that: (a) there was no basis for the constructive trust placed on Heilman's gross receipts attributable to sales of recorded performances owned by A & M Records; (b) A & M Records was not entitled to recovery of damages except on sales which occurred in California; and (c) the trial court's grant of punitive damages was in error.[10] We hold these contentions to be without merit.

A. *Constructive Trust*

It is uncontroverted that, with regard to the recordings

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[10] Heilman also contends that the punitive damage award was excessive. He bases this contention on assertions that the award was influenced by "passion and prejudice" and that the trial court improperly weighed the evidence of his net worth. But because the trial court is in a better position to determine whether a judgment was influenced by passion and is vested with the power to resolve issues of credibility, a failure to move for a new trial precludes an appellant from urging for such reasons that damages were excessive. Since Heilman made no motion for a new trial by reason of excessive damages, we may not review these contentions. (See *Topanga Corp.* v. *Gentile*, 1 Cal.App.3d 572, 577; *Glendale Fed. Sav. & Loan Assn.* v. *Marina View Heights Dev.*, Inc., 66 Cal. App.3d 101, 122.)

pertinent to this appeal, A & M Records manufactured and owns the master recordings of the recorded performances duplicated by Heilman. These recorded performances are A & M Records' intangible personal property. (Pen. Code, § 653h, subd. (b); *Radio Corp. of America* v. *Premier Albums, Inc.* (19 App.Div.2d 62 (1963)) 240 N.Y.S.2d 995, 997; *Capitol Records* v. *Mercury Records Corp.* (2d Cir. 1955) 221 F.2d 657, 662-663.)

At the trial on the issue of damages the court determined that by rerecording and offering for sale performances owned by A & M Records, Heilman misappropriated and sold A & M Records' property. The court correctly found that such misappropriation and sale of the intangible property of another without authority from the owner is conversion. (*Swim* v. *Wilson*, 90 Cal. 126, 128; *Miller* v. *Rau*, 216 Cal. App.2d 68, 77.)

On this basis the trial court entered judgment against Heilman in an amount equal to the gross proceeds attributable to the sale of recorded performances which were the property of A & M Records.[11] One who misappropriates the property of another is not entitled to deduct any of the costs of the transactions by which he accomplished his wrongful conduct. (*Ward* v. *Taggart*, *supra*, 51 Cal.2d at p. 744.) When one acquires proceeds from the sale of property belonging to another and the imposition of a constructive trust on the proceeds is a proper remedy. (Civ. Code, § 2224; *Church* v. *Bailey*, 90 Cal.App.2d 501, 504-505; Bogert, Trusts and Trustees (2d ed. 1960) § 476, pp. 56-62.)

[11] Also, the trial court found that due to defendants' inaccurate and incomplete books it was impossible to verify their alleged expenses. The court placed the burden of proof of these expenses on the defendants pursuant to its further finding that defendants alone possessed or had available information concerning the expenses they had incurred in their piracy and sales of recordings. (See Evid. Code, § 500 *Morris* v. *Williams*, 67 Cal.2d 733, 760.) Since the court found that defendants "failed to carry their burden of proof with respect to such costs and expenses," such costs and expenses would be entirely speculative. It would therefore be inequitable on this basis as well to permit Heilman to deduct them from A & M Records' recovery. (See *Ward* v. *Taggart*, 51 Cal.2d 736, 744.)

B. *Calculation of Damages*

Heilman urges that a state's power to provide copyright protection is only local and cannot extend beyond its borders. He contends therefore that the calculation of damages should have been limited to Heilman's sales within the State of California.

But the court did not award damages based on copyright infringement. Heilman's liability was imposed because he had engaged in unfair competition. A plaintiff suing on the basis of unfair competition has the right to seek relief for unfair competition committed in all states.[12] (Civ. Code, § 3333; *Cal. Prune Etc. Assn.* v. *H. R. Nicholson Co.*, 69 Cal.App.2d 207, 224-225; *Ojala* v. *Bohlin*, 178 Cal.App.2d 292, 301-302.)

[12] We note that Heilman's and E-C Tapes' record of sales contained no geographical breakdown. Additionally, as previously noted, the trial court found that Heilman's and E-C Tapes' books were incomplete and unreliable. It would be inequitable to allow Heilman to reduce the judgment by speculating as to the existence of sales outside the State of California. (Civ. Code, § 3517.)

C. *Punitive Damages*

The evidence in this case shows a continuous and intentional pattern of misappropriation of property owned by others. (Compare Pen. Code, § 653h.) It also shows contempt of court, hindered discovery, and an attempt to evade the injunctions of courts of this state as well as those issued by courts of Wisconsin. Under such circumstances a grant of punitive damages is clearly proper. (See *Ward* v. *Taggart, supra*, 51 Cal.2d at p. 743; *Southern Cal. Disinfecting Co.* v. *Lomkin*, 183 Cal. App. 2d 431, 451; *Gai Audio of N.Y., Inc.* v. *Columbia Broad. Sys. Inc.* (27 Md. App. 172 (1975)) 340 A. 2d 736, 753-755.)

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

COBEY, Acting P.J.

We concur: ALLPORT, J., POTTER, J.

MITCHELL, SILBERBERG & KNUPP, HOWARD S. SMITH, RUSSELL J. FRACKMAN, 1800 Century Park East, Los Angeles, California 90067, (213) 553-5000. Attorneys for Plaintiff, A & M Records, Inc.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR THE
COUNTY OF LOS ANGELES

A & M RECORDS, INC., a California corporation,
Plaintiff,
vs.
ECONOMIC CONSULTANTS, INC., dba E-C TAPE SERVICE, DAVID L. HEILMAN, CALIFORNIA GIRL PUBLISHING CO. INC., a California corporation, and DOE I through L, inclusive, Defendants.

NO. C 80979

JUDGMENT

The above-entitled cause came on regularly for trial on December 3, 1975 in Department 48 of the above-entitled Court, The Honorable Julius M. Title, Judge, presiding, without a jury. Trial commenced on said dates and continued on December 4, 5, 8, 9, 10 and 11, 1975. Plaintiff A & M Records, Inc., appeared by its attorneys, Mitchell, Silberberg & Knupp by Howard S. Smith and Russell J. Frackman; defendant Economic Consultants, Inc. doing business as E-C Tape Service, now known as E-C Tapes, Inc., appeared by its attorneys Wolf & Dubin by Bruce Benjamin; and defendant David L. Heilman appeared in propria persona.

Said cause proceeded on plaintiff's amended complaint for damages, injunctive relief, and accounting for unfair competition and unjust enrichment (tape piracy) and

on defendants Economic Consultants, Inc.'s and David L. Heilman's answer thereto. On August 15, 1975, this Court, by The Honorable Jerry Pacht, made and filed an order granting plaintiff's motion for summary judgment on the issue of liability and determining that plaintiff is entitled to a permanent injunction. As a result of said order, the trial of the cause was limited to a determination of the amount of compensatory and punitive damages to which plaintiff is entitled. Said cause having been heard, evidence oral and documentary having been introduced, the parties having submitted briefs and made arguments, said cause having been duly submitted for a decision, the Court having rendered its Memorandum of Intended Decision, filed December 22, 1975, and defendant Economic Consultantants, Inc., now known as E-C Tapes, Inc., having requested findings of fact and conclusions of law, and the Court having filed its written findings of fact and conclusions of law, and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff A & M Records, Inc. have judgment against defendants Economic Consultants Inc., doing business as E-C Tape Service, now known as E-C Tapes, Inc., and David L. Heilman, jointly and severally, in the sum of $80,000 compensatory damages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff A & M Records, Inc. have judgment against defendants Economic Consultants, Inc., doing business as E-C Tape Service, now known as E-C Tapes, Inc., and David L. Heilman, jointly and severally, in the sum of $50,000 punitive damages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff A & M Records, Inc. have judgment against defendants Economic Consultants, Inc., doing business as E-C Tape Service, now known as E-C Tapes, Inc., and David L. Heilman, jointly and severally, for costs and disbursements in the sum of $6,027.82, for a total judgment of $136,027.82.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants Economic Consultants, Inc., doing business as E-C Tape Service, now known as E-C Tapes, Inc., and David L. Heilman, and each of them, and their respective agents, servants, employees and all persons acting in concert with them, and each of them, are permanently enjoined and restrained from:

1. In any way and by means of any device whatever duplicating or transferring within the State of California to magnetic tape, disc phonograph records or any other device or thing, any part of any recorded performance contained or embodied in any phonograph record or on any magnetic tape manufactured or sold by plaintiff A & M Records, Inc., unless done with the consent, license and authority of plaintiff;

2. From advertising, offering for sale or selling in the State of California or shipping, sending, transporting, delivering or causing directly or indirectly to be shipped, sent, transported or delivered by any means or instrumentality whatever into the State of California any magnetic tape, disc phonograph record or other device containing any part of any recorded performance embodied on any phonograph record or magnetic tape manufactured or sold by plaintiff unless done with the consent, license and authority of plaintiff;

3. From directly or indirectly shipping, sending, transporting or delivering or causing to be shipped, sent, transported or delivered into the State of California, or placing or causing to be placed in any publication which will be shipped, transported or delivered into the State of California any advertisement, solicitation for offers or offer to sell, by any means or instrumentality whatever, any magnetic tape, disc phonograph record or other device containing any part of any recorded performance embodied in any phonograph record or magnetic tape manufactured or sold by plaintiff unless done with the consent, license and authority of plaintiff.

4. From using in connection with the sale, offer for sale, solicitation, or advertisement for sale, within the State of California, of any phonograph record or magnetic tape or any other device not manufactured by plaintiff, or any title of any album manufactured or sold by plaintiff, or any imitation of any title of any album manufactured or sold by plaintiff unless done with the consent, license and authority of plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the bonds that plaintiff A & M Records, Inc. filed to secure a temporary restraining order and preliminary injunction shall be exonerated, and neither the principal nor the surety therefor shall have any liability, as of the date of the order granting summary judgment on liability, that is, as of August 15, 1975.

The Clerk is ordered to enter this judgment.

Dated: March 10, 1976.

JULIUS M. TITLE
JUDGE OF THE SUPERIOR COURT

HOWARD S. SMITH, RUSSELL J. FRACKMAN, DAVID S. GUBMAN, 1800 Century Park East, Los Angeles, California 90067, (213) 553-5000. Attorneys for Plaintiff, A & M Records, Inc.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR THE
COUNTY OF LOS ANGELES

A & M RECORDS, INC., a California corporation,
vs.
ECONOMIC CONSULTANTS, INC., d/b/a E-C TAPE SERVICE DAVID L. HEILMAN, CALIFORNIA GIRL PUBLISHING CO., INC., a California corporation, and DOE I through L, inclusive, Defendants.

NO. C 80979

ORDER TO AMEND JUDGMENT NUNC PRO TUNC

Attention of the court having been called to the fact that the Judgment rendered in the above-entitled cause and entered on March 10, 1976, is incorrect in that the total amount of the Judgment, including compensatory damages, punitive damages and costs, was never entered on said Judgment in the space provided therefor, the court, on its own motion, makes the following order:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT the amount of $136,027.82 be entered nunc pro tunc as of March 10, 1976 in the space provided on page 3, line 9 of said Judgment and that in all other respects said Judgment remains the same.

Dated: April 13, 1976.

JUDGE OF THE SUPERIOR COURT

MITCHELL, SILBERBERG & KNUPP, HOWARD S. SMITH, RUSSELL J. FRACKMAN, 1800 Century Park East, Los Angeles, California 90067, (213) 553-5000, Attorneys for Plaintiff, A & M Records, Inc.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR THE
COUNTY OF LOS ANGELES

A & M RECORDS, INC., a California corporation,
Plaintiff,
vs.
ECONOMIC CONSULTANTS, INC., dba E-C TAPE SERVICE, DAVID L. HEILMAN, CALIFORNIA GIRL PUBLISHING CO., INC., a California corporation, and DOE I through L, inclusive, Defendants.

NO. C 80979

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on December 3, 1975 in Department 48 of the above-entitled Court, The Honorable Julius M. Title, Judge, presiding, without a jury. Trial commenced on said date and continued on December 4, 5, 8, 9, 10 and 11, 1975. Plaintiff A & M Records, Inc., appeared by its attorneys, Mitchell, Silberberg & Knupp by Howard S. Smith and Russell J. Frackman; defendant Economic Consultants, Inc., doing business as E-C Tape Service, now known as E-C Tape, Inc., appeared by its attorneys Wolf & Dubin by Bruce Benjamin; and defendant David L. Heilman appeared in propria persona.

Said cause proceeded on plaintiff's amended complaint for damages, injunctive relief, and accounting for unfair competition and unjust enrichment (tape piracy) and on defendants Economic Consultants, Inc.'s and David L. Heilman's answer thereto. On August 15, 1975, this Court, by The Honorable Jerry Pacht, made and filed an order granting plaintiff's motion for summary judgment on the issue of liability and determining that plaintiff is entitled to a permanent injunction. A copy of the order is annexed hereto as Exhibit 1 and by this reference incorporated herein. As a result of said order, the trial of the cause was limited to a determination of the amount of compensatory and punitive damages to which plaintiff is entitled. Said cause having been heard, evidence oral and documentary having been introduced, the parties having submitted briefs and made arguments, and said cause having been duly submitted for a decision, and the Court having rendered its Memorandum of Intended Decision, filed December 22, 1975, and defendant Economic Consultants, Inc., now known as E-C Tapes, Inc., having demanded written findings of fact and conclusions of law, the Court now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

The Court finds that:

1. Each and every issue found to be established without substantial controversy in the order granting summary judgment on liability and specifying issues without substantial controversy on the complaint filed in this action on August 15, 1975 is by this reference incorporated into and made a part of these findings of fact. A

true copy of said order is annexed hereto as Exhibit I and by this reference incorporated herein.

2. In the latter part of 1971, defendants Economic Consultants, Inc., doing business as E-C Tape Service and now known as E-C Tapes, Inc. (hereinafter "E-C Tapes") and David L. Heilman (hereinafter "Heilman") commenced their business which consists primarily of duplicating without authorization, onto disc phonograph records ("records") and magnetic tapes ("tapes"), recorded performances owned by plaintiffs and other record companies and offering for sale, advertising for sale and selling such unauthorized duplicates.

(This business of defendants is commonly known as record piracy and tape piracy, and the products sold by defendants are commonly referred to, and will hereafter be referred to, as pirated records and tapes.)

3. In May, 1975, the Federal Bureau of Investigation executed a search warrant and seized a substantial portion of defendants' pirated records and tapes. Up to the time that the trial of this action commenced, plaintiff assumed that defendants had ceased engaging in record and tape piracy as of the time of the execution of the search warrant by the Federal Bureau of Investigation.

4. Defendants were still engaging in their record and tape piracy as of the time of trial of this action or had continued to engage in that business up to three weeks prior to trial. Plaintiff did not ascertain this fact until Mrs. David L. Heilman, the wife of defendant Heilman, testified during the course of the trial.

5. From 1971 through approximately the middle of 1975, defendants made gross sales of pirated records and tapes of approximately $4,300,000.

6. From 1971 through approximately the middle of 1975, defendant Heilman personally received at least $200,000 from the tape and record piracy operations of defendant E-C Tapes. In addition, defendant E-C Tapes paid many of the personal expenses of defendant Heilman and the evidence presented to the Court did not demonstrate with any degree of accuracy which, if any, of these personal expenses of defendant Heilman were legitimately and properly paid by defendant E-C Tapes.

7. Defendants' pirated records and tapes were sold in albums containing 16 selections in each album. ("Album" as used in these findings of fact and conclusions of law refers both to disc phonograph record albums and prerecorded tape albums in the 8-track, cassette and reel-to-reel configurations.)

8. Fifteen recorded performances owned by plaintiff were duplicated ("pirated") by defendants and included in parts of various albums manufactured, advertised, offered for sale and sold by defendants. The recorded performances owned by plaintiff and duplicated by defendants were entitled:

THIS GUY'S IN LOVE WITH YOU
CLOSE TO YOU
WE'VE ONLY JUST BEGUN
DO YOU KNOW WHAT I MEAN
WILD WORLD
IT'S TOO LATE

YOU WERE ON MY MIND
GUANTANAMERA
WHITER SHADE OF PALE
LOOK OF LOVE
TICKET TO RIDE
SUPERSTAR
MOONSHADOW
HELLO HELLO
A MAN AND A WOMAN

Plaintiff is still offering for sale each of the aforesaid performances.

9. None of the albums of defendants' pirated records and tapes contained only plaintiff's recorded performances, but rather, in some of defendants' albums in question, one out of 16 recorded selections belonged to plaintiff and in others, two of the 16 recorded performances belonged to plaintiff and in still others, three out of the 16 recorded performances belonged to plaintiff.

10. Since defendants commingled recorded performances owned by plaintiff with recorded performances owned by other persons, it was not possible to determine from defendants' books and records the amount of defendants' gross receipts from the sale of only plaintiff's recorded performances but it was possible to compute from defendants' records at least an approximation of the gross receipts received by defendant E-C Tapes from the sale of albums containing recorded performances owned by plaintiff.

11. Defendants merely mechanically duplicated the exact recorded performances which plaintiff had produced at great cost and expense to plaintiff, defendants then sold those duplicated recorded performances under the label of defendant E-C Tapes. Such conduct constitutes the misappropriation or theft of plaintiff's property rather than the usual unfair competition where a defendant actually manufactures his own product which imitates or copies a plaintiff's product or attempts to palm off his own product as the product of a plaintiff.

12. The actual product of value which defendants misappropriated and sold is the intangible recorded performance (sometimes referred to as a "sound recording," see, for example, 17 U.S.C. §26 as amended by Pub. L 92-140, 85 Stat. 391 (1971)) produced by plaintiff and fixed or embodied in records and tapes manufactured and sold by plaintiff. Defendants actually misappropriated these recorded performances by duplicating them onto defendants' records and tapes and advertising, offering for sale and selling defendants' records and tapes. Defendants did not themselves actually produce any recorded performances of their own but sold only recorded performances produced and sold by plaintiff and others.

13. Defendants have not established the amount of costs and expenses incurred by defendants in misappropriating or pirating plaintiff's recorded performances.

14. Defendants had available to them all information concerning costs and expenses incurred by defendants in duplicating or pirating recorded performances owned by plaintiff and in advertising, offering for sale and selling such pirated record performances. Plaintiff did not have any such information available to it except insofar as plaintiff could secure such information from those books

and records of defendants which were provided by defendants to plaintiff.

15. Defendants' books and records were and are unreliable and incomplete.

16. Defendants' books and records were and are so unreliable that defendants' own certified public accountant was unable to prepare a certified statement or render an opinion as to the accuracy and reliability of those books and records; the electronic data processing system (or computer system) used by defendants was unsatisfactory and unreliable and it was not and is not possible to ascertain whether or not all sales made by defendants were and are reflected in defendants' books and records. Defendant E-C Tapes' own bookkeeping service stated that defendants' record keeping was of poor quality.

17. At the time of the examination of defendants' books and records by plaintiff's accountant prior to trial and a the time of trial, defendants' books and records were so incomplete and inadequate as to make it impossible to verify or ascertain the accuracy of those books and records. Plaintiff's accountant afforded to defendants a reasonable opportunity prior to trial to furnish him with additional records and information necessary to verify and ascertain the accuracy and adequacy of defendants' books and records; defendants failed to furnish plaintiff's accountant with such books and records.

18. Those books and records which defendants did produce to plaintiff's accountant before trial and at trial were incomplete in many respects. Defendants neither

kept nor produced any inventory records. Defendants' bank account records and bank statements were incomplete. Many necessary expense records were missing. Defendants' record keeping was of poor quality. As a result of all of the foregoing, it was impossible to verify either the correctness of the cash receipts or of the expenses and costs allegedly set forth in the books and records of defendant E-C Tapes.

19. All tax returns and summaries of the operations of defendant E-C Tapes and summaries of sales and expenses of defendant E-C Tapes were based upon the books and records of E-C Tapes which the Court has heretofore found to be incomplete and inaccurate, and in any event, covered costs and expenses incurred by defendant E-C Tapes in connection with *all* sales of its pirated records and tapes for the period in question, rather than costs and expenses incurred in connection with the sales of pirated records and tapes embodying recorded performances owned by plaintiff.

20. Defendants made no effort to produce evidence of the actual costs and expenses incurred by defendants in connection with the sales of only plaintiff's recorded performances. Viewing all of the evidence as a whole, defendants have failed to carry their burden of proof with respect to the amount of such costs and expenses.

21. Beginning with the fiscal year of defendant E-C Tapes ended February 28, 1973 through the fiscal year of said defendant ended April 30, 1975, defendants obtained gross receipts from the sale of records and tapes containing pirated recorded performances of plaintiff in the amount of approximately $729,337.11. Defendants

did not have any books or records breaking down such gross receipts to indicate the amount of gross receipts from the sales solely of plaintiff's recorded performances.

22. On the basis of the percentage of plaintiff's sound recordings contained in the printed records and tapes sold by defendants which make up the aforementioned gross receipts of $729,337.11, defendants obtained gross receipts from the sale of pirated records and tapes embodying recorded performances owned by plaintiff in the approximate amount of $74,000.00. However, this amount does not take into consideration the fact that defendants made sales of pirated records and tapes embodying recorded performances pirated from plaintiff prior to 1972 and subsequent to April 30, 1975. In addition, this amount does not take into consideration that it is more probable than not that defendants' books and records understated the sales of defendant E-C Tapes.

23. Defendants obtained gross receipts solely from the sale of pirated records and tapes embodying recorded performances pirated from plaintiff in the amount of at least $80,000.00.

24. Defendants did not keep any books or records breaking down the sale of defendants' pirated records and tapes by geographical areas. Defendants did not present any evidence in connection with the sale of E-C Tapes' albums by geographical area.

25. Defendants carried on substantial manufacturing operations in the State of California, including having "masters" and metal parts for the production of disc phonograph records manufactured in California, and

having a substantial quantity of disc phonogaph records and labels therefor manufactured in California, including phonograph records which embodied recorded performances owned by plaintiff.

26. Defendant E-C Tapes appointed at least one disc phonograph record manufacturing company located within the county of Los Angeles to be the agent of said defendant for the manufacture of disc phonograph records.

27. Defendant E-C Tapes twice, and defendant Heilman once, violated injunctions issued by this Court in this action and were adjudged in contempt of this Court therefor. In addition defendants violated injunctions issued against them by the courts of the State of Wisconsin restraining them from engaging in record and tape piracy. After defendants were enjoined by the Wisconsin courts, defendants moved their operations into the State of Illinois, where defendants' conduct was illegal as well, and they conducted substantial record and tape piracy operations in Illinois. After the execution of a search warrant against defendants and confiscation of their products by the Federal Bureau of Investigation in 1975, defendants nevertheless again commenced their record and tape piracy operations and were still operating them at or immediately prior to the time of trial.

28. After this Court enjoined defendants from selling their pirated records and tapes in California, and from shipping their pirated records and tapes into California, defendants endeavored to evade that injunction by, among other things, requiring customers in California to provide out-of-state addresses for trans-shipment.

29. Defendant Heilman, during the course of stealing recorded performances owned by plaintiff, as well as those owned by many other record companies, well knew that he was fraudulently and wrongfully using property belonging to others in violation of the law of California and other states, and defendant Heilman continued so to do in spite of many demands to cease and desist from this conduct.

30. The conduct of defendants E-C Tapes and Heilman in appropriating and stealing recorded performances owned by plaintiff and others was intentional and not innocent or in good faith. Defendants' aforesaid conduct amounts to oppressive, malicious and fraudulent conduct.

31. Although defendant Heilman had prepared a financial statement covering his net worth, and a financial statement of E-C Tapes, the Court has no confidence in those financial statements for the same facts and reasons set forth in Findings Nos. 14-18.

32. Defendants Heilman and E-C Tapes have for several years been involved in litigated cases in various parts of the United States involving legal problems arising out of the business of defendant E-C Tapes and have been able to finance such litigation. In all of the circumstances, including a consideration of the financial statements of defendants and the receipts derived by defendants as a result of their piracy operations, the sum of $50,000.00 is a reasonable sum to be awarded as punitive damages against defendants.

33. Inasmuch as the order granting summary judgment has found that defendant Heilman participated personally in all of the acts of defendant E-C Tapes, and since that order also found that he was the guiding force behind defendant E-C Tapes (which findings are further supported by the evidence at trial, and which this Court independently finds), the award of $80,000.00 compensatory damages and $50,000.00 punitive damages, and interest and costs should be against defendants E-C Tapes and Heilman, jointly and severally.

34. To the extent that any conclusion of law may be deemed to be a finding of fact, such conclusion of law is incorporated by reference into these findings of fact.

CONCLUSIONS OF LAW

From the foregoing findings of fact, the Court concludes as follows:

1. The conduct of defendants Heilman and E-C Tapes is not the usual form of unfair competition but rather is misappropriation, conversion and theft, by defendants of a valuable product, namely recorded performances produced by plaintiff at great expense, and owned by plaintiff.

2. The only product of value sold by defendants is the intangible recorded performances embodied on phonograph records and tapes manufactured and owned by plaintiff which are duplicated by defendants. Defendants do not manufacture or sell their own product, but manufacture and sell a product belonging exclusively to plaintiff.

3. Defendants have converted and wilfully used property lawfully belonging to plaintiff by duplicating or pirating recorded performances produced by and belonging to plaintiff, and by selling pirated records and tapes embodying such pirated recorded performances.

4. Plaintiff is entitled to the imposition of a constructive trust upon the gross proceeds received by defendants from the misappropriation, conversion, and theft by defendants of plaintiff's property.

5. Since defendants have wrongfully misappropriated and converted the property of plaintiff, defendants are not entitled to deduct any of the costs they incurred in the manufacture, advertising or sale of pirated records and tapes containing recorded performances owned by plaintiff.

6. Even if defendants were entitled to deduct the costs of their enterprise, defendants have the burden of proof of establishing the costs attributable to the duplication, advertising and sale of plaintiff's product, and defendants have not met that burden of proof.

7. Plaintiff is entitled to recover from defendants jointly and severally compensatory damages consisting of the gross receipts received by defendants from the sale of pirated records and tapes embodying plaintiff's sound recordings in the amount of $80,000.00.

9. Since the Court has personal jurisdiction over defendants, plaintiff is entitled to recover compensatory damages on all sales made by defendant E-C Tapes and not just on sales made by said defendant within the State

of California. In any event, even if defendants could limit plaintiff's recovery to sales within the State of California, the burden is on defendants to prove those sales which took place within California, and defendants failed to meet that burden of proof.

10. The conduct of defendants, and each of them, has been wilful, oppressive, malicious and fraudulent, and plaintiff is entitled to recover in addition to its actual damages, damages for sake of example and by way of punishing defendants.

11. Plaintiff is entitled to recover from defendants jointly and severally punitive damages in the amount of $50,000.00.

12. Plaintiff is entitled to recover from defendants jointly and severally, its costs.

13. To the extent that any finding of fact may be deemed to be a conclusion of law, such finding of fact is incorporated by reference in these conclusions of law.

14. The bonds that plaintiff filed to secure a temporary restraining order and preliminary injunction shall be exonerated, and neither the principal nor surety therefor shall have any liability, as of the date of the order granting summary judgment on liability, that is, as of August 15, 1975.

The Clerk is directed to enter judgment in accordance with these findings of fact and conclusions of law and in accordance with the order granting summary judgment

on libility and specifying issues without substantial controversy on the complaint made and filed in this action on August 15, 1975.
Dated: March 10, 1976.

JULIUS M. TITLE
JUDGE OF THE SUPERIOR COURT

MITCHELL, SILBERBERG & KNUPP, HOWARD S. SMITH, RUSSELL J. FRACKMAN, D. WAYNE JEFFRIES, 1800 CENTURY PARK EAST, LOS ANGELES, CALIFORNIA 90067, (213) 553-5000, Attorneys for Plaintiff, A&M Records, Inc.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR THE
COUNTY OF LOS ANGELES

A&M RECORDS, INC., a California Corporation, Plaintiff,
vs.
ECONOMIC CONSULTANTS, INC., dba E-C TAPE SERVICE, DAVID L. HEILMAN, CALIFORNIA GIRL PUBLISHING CO., INC., a California corporation, and DOES I through L, inclusive, Defendants.

NO. C 80979

ORDER GRANTING SUMMARY JUDGMENT ON LIABILITY AND SPECIFYING ISSUES WITHOUT SUBSTANTIAL CONTROVERSY ON THE COMPLAINT.

Plaintiff's motion for summary judgment, or in the alternative for order specifying issues without substantial

controversy on the complaint came on for hearing on August 8, 1975, in Department 88 of the above-entitled court, before the Honorable Jerry Pacht, Judge. The court having read and considered the memoranda, declarations and affidavits filed in support of and in opposition to said motion, and having heard oral argument in support of and in opposition to said motion, it appears and the Court finds that there exists no triable issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law in connection with the liability of defendant Economic Consultants, Inc., on the amended complaint and the first and second causes of action thereof, that there exists no triable issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law with respect to the liability of defendant David L. Heilman, individually, on the amended complaint and on the first and second causes of action thereof and,

IT IS ORDERED that a judgment of liability on the amended complaint and on the first and second causes of action thereof, be entered in accordance with this order in favor of plaintiff, A&M Records, Inc., and against defendant Economic Consultants, Inc., and

IT IS FURTHER ORDERED that a judgment of liability on the amended complaint and on the first and second causes of action thereof be entered in accordance with this order in favor of plaintiff, A&M Records, Inc., and against defendant David L. Heilman.

The Court further finds that the issues stated below are without substantial controversy and that plaintiff has shown such issues to be without substantial controversy

by admissible evidence and reasonable inferences from that evidence and,

IT IS ORDERED that the following issues be and hereby are deemed established and without substantial controversy:

1. Plaintiff is engaged in the business of manufacturing and selling records of musical and other performances embodied on disc phonograph records, singles or albums, and magnetic tapes of various configurations.

2. Defendants Heilman and Economic Consultants, Inc. sell duplications of certain recorded performances owned by plaintiff.

3. Defendants Heilman and Economic Consultants, Inc. offer for sale, advertise for sale, and sell duplications of at least fourteen (14) recorded performances which are owned by plaintiff.

4. Defendants Heilman and Economic Consultants, Inc. advertise and offer for sale duplications of certain recorded performances owned by plaintiff.

5. Plaintiff has not given defendants any license, authority or consent to sell, advertise or offer for sale any copy, duplications or reproduction of any part of any recorded performances owned by plaintiff.

6. David L. Heilman is the founder and guiding person of Economic Consultants, Inc.

7. Defendants Heilman and Economic Consultants,

Inc. have sold in the State of California duplications of certain recorded performances owned by plaintiff.

8. Defendants Heilman and Economic Consultants, Inc. have advertised and offered for sale in the State of California, duplications of certain recorded performances owned by A&M Records.

9. Defendants Heilman and Economic Consultants, Inc. use, in the advertising and sale of their product, the titles of certain recorded performances owned by plaintiff.

10. Plaintiff has not given defendants any license, consent or authority to use in any manner the title of any recorded performance owned by plaintiff.

11. Defendants Heilman and Economic Consultants, Inc. use, in the advertising and sale of their product, the names of certain performers who have recorded certain recorded performances owned by plaintiff.

12. Plaintiff has not given defendants any license, consent or authority to use in connection with the sale, offering for sale or advertising of duplications of any recorded performance owned by plaintiff, the name of any performer who has recorded said recorded performance for plaintiff.

13. No performer has given defendants any license, consent or authority to use in connection with the sale, offering for sale or advertising of duplications of any recorded performance owned by plaintiff, the name of

said performer who has recorded said recorded performance for plaintiff.

14. Defendant Heilman has personally participated in the acts of unfair competition established above and is the person who determines what recorded performances owned by plaintiff were and are to be duplicated, caused to be duplicated, advertised and sold by defendants.

15. Plaintiff has established without substantial controversy each and every fact necessary to establish that defendant Economic Consultants, Inc. is liable to plaintiff under the first cause of action of the amended complaint herein.

16. Plaintiff has established without substantial controversy each and every fact necessary to establish that defendant David L. Heilman is liable to plaintiff under the first cause of action of the amended complaint herein.

17. Plaintiff has established without substantial controversy each and every fact necessary to establish that defendant Economic Consultants, Inc. is liable to plaintiff under the second cause of action of the amended complaint herein.

18. Plaintiff has established without substantial controversy each and every fact necessary to establish that defendant David L. Heilman is liable to plaintiff under the second cause of action of the amended complaint herein.

19. Plaintiff is entitled to a permanent injunction enjoining defendants David L. Heilman and Economic

Consultants, Inc. and each of them, and their agents, servants, employees and all persons acting in concert with them, and each of them, from:

1. In any way and by means of any device whatever duplicating or transferring within the State of California to magnetic tape, disc phonograph records or any other device or thing, any part of any recorded performance contained or embodied in any phonograph record or on any magnetic tape manufactured or sold by plaintiff A&M Records, Inc., unless done with the consent, license and authority of plaintiff;

2. From advertising, offering for sale or selling in the State of California or shipping, sending, transporting, delivering or causing directly or indirectly to be shipped, sent, transported or delivered by any means or instrumentality whatever into the State of California any magnetic tape, disc phonograph record or other device containing any part of any recorded or magnetic tape manufactured or sold by plaintiff unless done with the consent, license and authority of plaintiff;

3. From directly or indirectly shipping, sending, transporting or delivering or causing to be shipped, sent, transported or delivered into the State of California, or placing or causing to be placed in any publication which will be shipped, transported or delivered into the State of California any advertisement, solicitation for offers or offer to sell, by any means or instrumentality whatever, any magnetic tape, disc phonograph record or other device containing any part of any recorded performance em-

bodied in any phonograph record or magnetic tape manufactured or sold by plaintiff unless done with the consent, license and authority of plaintiff;

4. From using in connection with the sale, offer for sale, solicitation, or advertisement for sale, within the State of California, of any phonograph record or magnetic tape or any other device not manufactured by plaintiff, or any title of any album manufactured or sold by plaintiff, or any imitation of any title of any album manufactured or sold by plaintiff unless done with the consent, license and authority of plaintiff.

DATED: August 15, 1975.

JERRY PACHT
LOS ANGELES SUPERIOR COURT JUDGE

Receipt of the within proposed order is acknowledged this 12th day of August, 1975. WOLF & DUBIN, By Bruce Bergan.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Date: November 24, 1975.
Honorable Norman R. Dowds, Judge.
Honorable Judge Pro Tem, none.
H. Pease, Deputy Clerk, 88.
Y. Yamada, Reporter.

C 80979
A&M Records, Inc., etc.
vs.
Economic Consultants, Inc., etc., et al
Counsel for Plaintiff: Mitchell, Silberberg & Knupp by H. Smith.
Counsel for Defendant: Wolf & Dubin by B. Benjamin & L. Dubin for deft Economic Consultants, Inc., etc., David L. Heilman, in pro per, Thomas M. Kells.

Nature of Proceedings.

1. Motion of plaintiff to strike answers and to enter defaults or in the alternative to preclude each defendant from introducing evidence at trial of this action and for costs and expenses including attorneys fees.

Matters are transferred from Dept. 87.

1. Motion granted in part as follows: Defendants Economic Consultants, Inc. and David L. Heilman are precluded from introducing at trial any documents listed in plaintiff's Notice to Appear at Trial and Notice to Produce Documents at Trial filed November 7, 1975 which they have not heretofore produced or which they do not produce at office of plaintiff's counsel in Los Angeles by 4:00 P.M. on

November 26, 1975. Defendant David L. Heilman is precluded from testifying at trial respecting matters questions respecting which he refused to answer at his deposition on October 24, 1975. Balance of motion denied.

2. Motion of defendant David Heilman for order dissolving protective order.

2. Motion denied without prejudice to request to trial judge to examine documents relevant to issues then before the Court.

3. Motion of defendant David Heilman for dismissal or stay of proceedings pursuant to the doctrine of forum non conveniens.

3. Motion denied.

4. Application of Thomas M. Kells to be admitted as counsel pro hac vice (trans. from Dept. 87 and advanced from 11/25/75 pursuant to stipulation)

4. Motion Denied.
Notice Waived.

Minutes Entered, Nov. 24, 1975, County Clerk, Dept. 88.

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

A&M RECORDS, INC., a California Corporation, Plaintiff and Respondent,

vs.

DAVID L. HEILMAN, Defendant and Appellant.

NOTICE OF APPEAL

DAVID L. HEILMAN, by his attorneys, LAWTON & CATES, Richard L. Cates and Bruce F. Ehlke, all of Madison, Wisconsin, hereby gives notice that he appeals to the Supreme Court of the United States of America, from the decision of the Supreme Court of the State of California denying his petition for hearing. Said decision was entered January 26, 1978. This decision affirmed the decision of Court of Appeal of the State of California, Second Appellate District, Division three, filed November 30, 1977. David L. Heilman takes this appeal under 28 U.S.C. Sec. 1257(2).

Dated: April 13, 1978

LAWTON & CATES, RICHARD L. CATES, 110 East Main Street, Madison, Wisconsin 53703.

Attorney For Defendant and Appellant, David L. Heilman.

IN THE SUPREME COURT
OF THE STATE OF
CALIFORNIA

A&M RECORDS, INC., a California Corporation, Plaintiff and Respondent,

vs.

DAVID L. HEILMAN, Defendant and Appellant.

AFFIDAVIT OF SERVICE.

STATE OF WISCONSIN, COUNTY OF DANE, ss

JO ANN ZEICHERT, being first duly sworn, on oath deposes and says that she served the Notice of Appeal upon Supreme Court of California, Clerk of Courts, at 4250 State Building, San Francisco, California 74102; Court of Appeals, Clerk, at 3580 Wilshire Boulevard, Los Angeles, California 90010; and Attorney Howard S. Smith of MITCHELL, SILBERBERG & KNUPP, at 1800 Century Park East, Los Angeles, California 90067, by placing copies of same in the United States mail, properly addressed and postage prepaid, on the 14th day of April, 1978.

JO ANN ZEICHERT

Subscribed and sworn to before me this 14th day of April, 1978.

James W. Gardner, Notary Public, State of Wisconsin.
My Commission: Permanent.

Cal. Civil Procedure Code § 2034

§ 2034. [Proceedings, and sanctions imposed, on refusal to answer or produce articles]

(a) If a party or other deponent refuses or fails to answer any question propounded upon examination during the taking of a deposition, or refuses or fails to produce at a deposition any books, documents or other things under his control pursuant to a subpoena duces tecum, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Such proponent, on notice to all persons affected thereby, may move the court in which the action is pending (if the deponent is a party or otherwise subject to the jurisdiction of such court), or if such court does not have jurisdiction over the deponent, to the superior court of the county in which the deposition is taken for an order compelling an answer or if good cause is shown, the production of such book, document, or other thing. Such motion may also be made, without further notice, if the proponent notifies the refusing party or other deponent at the time of such refusal or failure that the proponent will apply to the court for an order pursuant to this subdivision of this section, at a specified time not less than 10 nor more than 30 days from the date of such refusal or failure, in which event the officer before whom the deposition is taken shall direct the refusing or failing party or other deponent to attend a session of said court at said time. Not less than five days prior to the hearing on any such motion, the proponent must lodge with the court the original transcript of such deposition. Upon the refusal or failure of a party to answer any interrogatory submitted under Sec-

tion 2030 of this code, the proponent of the question may on like notice make like application for such an order. Upon the refusal or failure of a party to admit or deny the genuineness of any documents or the truth of any matters of fact, after having been served with a request under Section 2033 of this code, the party serving such request may on like notice make like application for an order requiring further answers to such request or, in the alternative, for an order that the genuineness of said documents or the truth of said matters of fact be deemed admitted for the purpose of the action. Upon the refusal or failure of a party to permit inspection or entry after having been served with a request under Section 2031 of this code, the party serving such request may on like notice and upon a showing of good cause make application for an order to compel compliance with the request. If the motion is granted and if the court finds that the refusal of failure was without substantial justification the court may require the refusing or failing party or deponent and the party or attorney advising the refusal or failure or either of them to pay the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court may require the examining party or the attorney advising the motion or both of them to pay to the refusing or failing party or witness the amount of the reasonable expenses incurred in opposing the motion including reasonable attorney's fees.

(b) (1) The court may punish as a contempt (i) the refusal of any person to obey a subpoena issued by that court to attend a deposition or to be sworn as a witness,

or (ii) the refusal of any person to attend a session of court (either personally or by his attorney) after having been directed to attend in the manner provided in subdivision (a) of this section, or (iii) the refusal of any person to obey any order made by the court under subdivision (a) of this section.

(2) If any party or person for whose immediate benefit the action or proceeding is prosecuted or defended, or an officer, director, superintendent, member, agent, employee or managing agent of any such party or person refuses to obey on order made under subdivision (a) of this section, or if any party or an officer or managing agent of a party refuses to obey an order made under Sections 2019, 2031 or 2032 of this code, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental or blood condition of the person sought to be examined, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of the physical or mental or blood condition of the person sought to be examined;

(iii) An order striking out pleadings or parts thereof,

or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) An order requiring the disobedient party or the attorney advising such disobedience to pay to the party obtaining an order under this section the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees;

(v) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental or blood examination;

(vi) Where a party has failed to comply with an order under subdivision (a) of Section 2032 of this code requiring him to produce another for examination, such orders are listed in (i), (ii), and (iii) of this subdivision of this section, unless the party failing to comply shows that he is unable to produce such person for examination.

(c) If a party, after being served with a request under Section 2033 of this code to admit the genuineness of any documents of the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court in the same action for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. If the court finds that there were no good

reasons for the denial and that the admissions sought were of substantial importance, the order shall be made.

(d) If a party or a person for whose immediate benefit the action or proceeding is prosecuted or defended or anyone who at the time the deposition is set is an officer, director, or managing agent of any such party or person willfully fails to appear before the officer who is to take his deposition, after said party or his attorney has been served with proper notice in accordance with the provisions of subdivision (a)(4) of Section 2019 of this code, or if a party or an officer or managing agent of a party willfully fails to serve answers to interrogatories submitted under Section 2030 of this code, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party, or impose such other penalties of a lesser nature as the court may deem just, and may order that party or his attorney to pay to the moving party the reasonable expenses in making such motion, including reasonable attorney's fees.

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1535

DAVID L. HEILMAN,

Appellant,

vs.

A & M RECORDS, INC., a California Corporation,

Appellee.

On Appeal From the Supreme Court of the State of California.

Motion to Dismiss Appeal or, in the Alternative, to Affirm.

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Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

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Appellee.

On Appeal From the Supreme Court of the State of California.

Motion to Dismiss Appeal or, in the Alternative, to Affirm.

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee A & M Records, Inc. (plaintiff below) moves that this appeal be dismissed on the ground that this Court does not have jurisdiction thereof, appellant not having challenged the validity of any state statute on the grounds of its repugnancy to the Constitution, treaties or laws of the United States. Appellee alternatively moves that the judgment below be affirmed because the questions raised turn upon state law and, in any event, are so unsubstantial as not to need further argument.

Statement of the Case and Proceedings Below.

Appellant has mischaracterized both the facts and the proceedings below. The findings of fact and conclusions of law of the trial court are annexed at pages 28-42 of the Appendix to the Jurisdictional Statement ("Juris. Stmt. Appen."). The decision of the California Court of Appeal[1] accurately summarizes the facts as found by the trial court.[2] The pertinent facts respecting appellant's conduct are also stated in six prior reported decisions involving appellant.[3]

The following facts are particularly pertinent to this appeal.

Appellee is a Los Angeles based record company which owns, manufactures and sells recorded musical performances by popular artists in the form of disc phonograph records and pre-recorded magnetic tapes. Appellant is an admitted record and tape pirate,[4] who conducted his record and tape piracy through his co-defendant, Economic Consultants, Inc., now known as E-C Tape, Inc. and doing business as E-C Tape Service (hereinafter referred to as "E-C"). Appellant

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[1]*A & M Records, Inc. v. Heilman,* 75 Cal. App. 3d 554, 142 Cal. Rptr. 390 (1977); the decision also appears in Juris. Stmt. Appen. at 4-22.

[2]*Id.,* 75 Cal. App. 3d at 560-61, 142 Cal. Rptr. at 394-95, Juris. Stmt. Appen. at 5-8.

[3]*See* cases cited note 5 *infra.*

[4]"Record piracy" and "tape piracy" are the terms commonly employed to describe the theft of recorded performances by the manufacture and sale of unauthorized duplicates of records and tapes. *See Goldstein v. California,* 412 U.S. 546, 549 (1973); *Aeolian Co. v. Royal Music Roll Co.,* 196 F. 926 (W.D.N.Y. 1912); *Shapiro, Bernstein & Co. v. Remington Records, Inc.,* 265 F.2d 263, 269, 273 (2d Cir. 1959); *Tape Indus. Ass'n of America v. Younger,* 316 F. Supp. 340, 351 (C.D. Cal. 1970), *appeal dismissed,* 401 U.S. 902 (1971), *aff'd per curiam,* No. 26,628 (9th Cir. Oct. 1, 1973); Note, *Piracy on Records,* 5 Stan. L. Rev. 433 (1953).

and E-C have been enjoined by the Circuit Court of Milwaukee County, Wisconsin from engaging in record and tape piracy in any place (as distinguished from the injunction issued by the Superior Court of Los Angeles County in this case, which enjoined them only from engaging in record and tape piracy in California). Appellant has been jailed for contempt of that Wisconsin injunction (in addition to having been found in contempt of the Superior Court injunction in this case). The Supreme Court of Wisconsin has characterized appellant's record and tape piracy as "larceny", and appellant's admitted record and tape piracy has repeatedly been adjudged to be both civil and criminal violations of the federal Copyright Act.[5]

Commencing in the latter part of 1971, appellant and E-C, without consent or authorization, duplicated recorded performances owned by appellee and other record companies and advertised and sold pirated records and tapes in California and elsewhere.[6] There is no dispute that appellant and E-C carried on substantial unlawful duplication activities in California and appointed a Los Angeles manufacturer their agent for the manufacture of pirated records embodying recorded performances owned by appellee and others.[7]

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[5]*Mercury Record Prods., Inc. v. Economic Consultants, Inc.,* 64 Wis. 2d 163, 218 N.W.2d 705, 714 (1974), *appeal dismissed and cert. denied.* 420 U.S. 914 (1975); *see also Heilman v. Bell,* 434 F. Supp. 564, 566-67 (E.D. Wis. 1977), *motion for TRO and prelim. inj. denied sub nom. in Heilman v. Levi,* 391 F. Supp. 1106, 1111-13 (E.D. Wis. 1975), *appeal docketed,* No. 77-1968 (7th Cir. Sept. 26, 1977); *Heilman v. Wolke,* 427 F. Supp. 730 (E.D. Wis. 1977); *E-C Tape Service, Inc. v. Barron,* 71 F.R.D. 585 (E.D. Wis. 1976); *E-C Tapes, Inc. v. Kelly,* 412 F. Supp. 245, 248 (N.D. Ill. 1975). Record and tape piracy also violates several other federal criminal statutes. *See United States v. Taxe,* 540 F.2d 961 (9th Cir. 1976), *cert. denied,* 429 U.S. 1040 (1977).

[6]Finding No. 2, Juris. Stmt. Appen. at 30.

[7]Finding No. 26, Juris. Stmt. Appen. at 37.

Appellee brought this action against appellant and E-C in Los Angeles County Superior Court for unfair competition and unjust enrichment, seeking monetary damages for the misappropriation of appellee's product. Appellee also sought, and the trial court granted, a temporary restraining order and later a preliminary injunction enjoining appellant and E-C from, without appellee's consent, duplicating in California recorded performances owned by appellee, and from advertising, offering for sale or selling in California pirated records and tapes embodying recorded performances owned by appellee.

The Superior Court granted summary judgment in favor of appellee on the issue of liability and ordered that the preliminary injunction be made permanent. At the conclusion of a trial to the court on the issue of damages, appellee was awarded compensatory damages of $80,000.00, punitive damages of $50,000.00 and costs against appellant and E-C, jointly and severally. E-C did not appeal, and the judgment is now final as to it.

Questions Presented by Appeal.

Appellant does not accurately state the issues before this Court. The questions presented by this appeal are:

1. Does the Supreme Court of the United States have jurisdiction of an appeal pursuant to 28 U.S.C. §1257(2), where the decision of the highest court of the state (by declining to review an intermediate appellate court decision) is based on that court's construction of the common law of that state, and where appellant did not at any time, in either the trial court

or the state's appellate courts, question the validity of any state statute on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and where the state courts did not at any time determine the validity of any state statute?

2. Do the California courts have the power to hold that record and tape piracy, carried on in California by a defendant over whom California has personal jurisdiction, is unfair competition under the common law of California and to enjoin such record and tape piracy in or aimed at California, even though that defendant engages in record and tape piracy in other states as well?

3. Do the California courts have the power to hold that record and tape piracy, by a defendant over whom California has personal jurisdiction, and who manufactured pirated phonograph records in California, is unfair competition entitling the plaintiff to recover damages resulting from all that defendant's activities and sales, where the defendant has not shown that his operations were legal in any state, and where he has made it impossible to isolate that portion of his activities occurring solely in California?

4. Has appellant properly raised any substantial federal question?

I

This Court Does Not Have Jurisdiction of This Appeal.

Appellant invokes this Court's jurisdiction under 28 U.S.C. §1257(2) which provides in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

". . . .

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

This Court lacks appellate jurisdiction under 28 U.S.C. §1257(2) because an essential prerequisite to such jurisdiction is lacking here: this case does not in any way involve the validity of a state statute.

A. Appellant Did Not Raise, and the California Courts Did Not Decide, the Validity of Any California Statute.

The decision of the California Court of Appeal is based on that court's interpretation of the common law of California. The California Court of Appeal did no more than rule that appellant committed the common-law tort of unfair competition by misappropriating the intangible property of appellee, thereby entitling appellee to damages and an injunction. The California Court of Appeal simply applied a common-law doctrine enunciated by this Court in *International News Service v. Associated Press*, 248 U.S. 215 (1918), held to be applicable to record and tape piracy in *Capitol Records, Inc. v. Erickson*, 2 Cal. App. 3d 526, 82 Cal. Rptr. 798 (1969), *cert. denied*, 398 U.S. 960 (1970), and applied to record piracy as recently as last month by the Court of Appeals for the Sixth Circuit. *See A & M Records, Inc. v. M.V.C. Distributing Corp.*, No. 76-1843-44, slip op. at 3 (6th Cir. April 7, 1978).[8]

[8]The "misappropriation" doctrine was first applied to record piracy by a federal court the same year that Congress enacted the Copyright Act of 1909. *Fonotipia, Ltd. v. Bradley*, 171 F. 951 (C.C.E.D.N.Y. 1909).

Appellant pirated records which had been fixed prior to February 15, 1972 and which are accordingly protected against piracy under state law. *See Goldstein v. California, supra.* Recordings fixed subsequent to February 15, 1972 are protected against piracy by federal law. 17 U.S.C. §§102(a)(7), 106, 114. Piracy of recordings fixed prior to February 15, 1972 is a crime in forty-nine states, including California, and the courts of every state which have decided the issue have held that record and tape piracy is unfair competition.[9]

Appellant's contention that the validity of a state statute is drawn into question wholly ignores the fact that this liability is predicated on his commission of the common-law torts of misappropriation and conversion. The California Court of Appeal plainly based its decision on the common law of the State of California. In its opinion, the court stated that appellant's conduct constituted unfair competition because it was misappropriation.[10] *See also* Restatement (Second) of Torts, Introductory Note to Chapter 35 (Tent. Draft No. 8, 1963) (recognizing that the law of unfair competition and unfair trade practices derives from the common law).

[9]*See* Cal. Penal Code §653h; *Capitol Records, Inc. v. Erickson*, 2 Cal. App. 3d 526, 82 Cal. Rptr. 798 (1969), *cert. denied*, 398 U.S. 960 (1970) and statutes and decisions of other states collected in Exhibits 1 and 2 to this motion. In the new Copyright Act, Congress expressly recognized and confirmed the right of the states to protect pre-1972 recordings against piracy until 2047, exempting such recordings from the general rule of federal preemption contained in the new Copyright Act. 17 U.S.C. §301(c).

[10]*A & M Records, Inc. v. Heilman, supra*, 75 Cal. App. 3d at 564, 142 Cal. Rptr. at 396, Juris. Stmt. Appen. at 11-12.

That California has codified a portion of the common law does not draw any statute into question. The legislature, in enacting Civil Code §3369, carefully chose the phrase "shall mean and include" in defining unfair competition, to indicate that the statutory definition was not intended to be restrictive or exclusive. *Athens Lodge No. 70 v. Wilson*, 117 Cal. App. 2d 322, 325, 255 P.2d 482, 484 (1953). The legislature has left it to the courts "to determine what conduct will constitute unfair competition in a particular case." *Hall v. Wright*, 125 F. Supp. 269, 272 (S.D. Cal. 1954) (applying California law); *Ojala v. Bohlin*, 178 Cal. App. 2d 292, 301, 2 Cal. Rptr. 919, 924 (1960) ("The legal concept of unfair competition has evolved as a broad and flexible doctrine with a capacity for further growth to meet changing conditions, and there is no complete list of the activities which constitute unfair competition."). Such case-by-case adjudication is but the development of the common law; the validity of a statute is not drawn in question thereby.

B. The Cases Cited in the Jurisdictional Statement Do Not Support Appellant's Argument That This Court Has Jurisdiction of This Appeal.

Appellant has cited two cases to support his claim that the judgment of the California Supreme Court is a "legislative act" and that he is accordingly appealing from a decision upholding the validity of a statute: *Lathrop v. Donohue*, 367 U.S. 820 (1961); and *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S.

282 (1921). Appellant also relied on these cases in presenting his prior appeal to this Court.[11]

Lathrop held that an order of the Wisconsin Supreme Court integrating the Wisconsin bar was to be considered a "statute" for the purpose of 28 U.S.C. §1257(2) because it was legislative in nature, "bore no resemblance to adjudication . . . [and] disposed of no litigation between parties." 367 U.S. at 827. *Dahnke-Walker* involved the validity of a Kentucky statute prescribing conditions to doing business in the State.

The judgment appealed from here, on the other hand, has all the attributes of adjudication and represents the culmination of litigation between parties. The principles, rationales and express holdings of *Lathrop* and *Dahnke-Walker* therefore have no bearing here.

"The common law is constantly and generally used in contradistinction to statute law." *Lessee of Levy v. M'Cartee*, 31 U.S. (6 Pet.) 102, 110 (1832). " 'It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.' " *Lutwak v. United States*, 344 U.S. 604, 615 (1953), quoting from *Funk v. United States*, 290 U.S. 371, 383 (1934); *cf. Ojala v. Bohlin*, *supra*,

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[11] *See* Jurisdictional Statement at 13, 15, *Economic Consultants, Inc. v. Mercury Record Prods., Inc.*, 420 U.S. 914 (1975). *See also* pp. 10-11 *infra*. *Market St. R.R. Co. v. Railroad Comm'n*, 324 U.S. 548 (1945), also relied upon by appellant (Juris. Stmt. at 2), deals with finality of a state court's decision, not whether a statute is drawn in question.

ascribing the same attribute of flexibility to California's definition of unfair competition. Acceptance of appellant's argument that the California Court of Appeal's construction of the California common law of unfair competition is "legislation" and sufficient to invoke this Court's appellate jurisdiction under 28 U.S.C. §1257(2), would render the references to state statutes in §1257 meaningless.

II

Even if This Court Has Jurisdiction the Judgment Below Should Be Affirmed Because the Appeal Does Not Present a Substantial Federal Question and Because the Questions Presented Are so Unsubstantial as Not to Need Further Argument.

Every colorable federal question raised by appellant was answered by this Court in *Goldstein v. California*, 412 U.S. 546 (1973), and *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974). There is no reason for reexamination of any of these issues.

This is not the first time appellant has asked this Court to rule that federal law exempts his record and tape piracy from the consequences of state law. In *Mercury Record Productions, Inc. v. Economic Consultants, Inc.*, 64 Wis. 2d 163, 218 N.W.2d 705 (1974), *appeal dismissed and cert. denied*, 420 U.S. 914 (1975), the Supreme Court of Wisconsin held that record and tape piracy was enjoinable unfair competition. The defendants in that action, E-C and appellant herein, appealed to this Court from the decision of the Supreme Court of Wisconsin. In his Jurisdictional

Statement in that appeal, appellant raised substantially the same questions presented here. He asserted that the Wisconsin Supreme Court decision violated the copyright clause by creating "copyright protection for records which were fixed prior to February 15, 1972";[13] that the decision of the Wisconsin Supreme Court violated the supremacy clause and was contrary to this Court's decision in *Goldstein v. California*, 412 U.S. 546 (1973);[14] that the decision of the Wisconsin Supreme Court violated the commerce clause by prohibiting interstate and international commerce in pirated records and tapes;[15] that the decision of the Wisconsin Supreme Court violated the copyright and supremacy clauses by prohibiting the sale of recordings which had been granted federal compilation copyrights;[16] and that Congress had preempted the field by its passage of the Sound Recording Act, Public Law 92-140, 85 Stat. 391 (1971).[16] This Court dismissed appellant's prior appeal and denied certiorari. *Economic Consultants, Inc. v. Mercury Record Productions, Inc.*, 420 U.S. 914 (1975).

These same issues, raised by appellant in this appeal, are just as unsubstantial now as they were in appellant's prior appeal.

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[13]Jurisdictional Statement at 5, *Economic Consultants, Inc. v. Mercury Record Prods., Inc.*, 420 U.S. 914 (1975).

[14]*Id.*

[15]*Id.* at 6.

[16]*Id.*

[16]*Id.*

A. The California Court of Appeal's Construction of California Common Law and the Scope of the California Injunction Do Not Present Any Substantial Federal Question.

Exposition of California's common law of unfair competition and, in particular, whether the misappropriation doctrine is a part of that common law, and whether record and tape piracy is tortious, are not within this Court's jurisdiction, but are matters within the exclusive province of the California courts. "[W]hether or not given conduct is tortious is a question of state law . . . ." *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457, 468 (1941). "Under the view . . . of the statutes conferring appellate jurisdiction on this Court, we have no power to revise judgments on questions of state law." *Henry v. Mississippi*, 379 U.S. 443, 446-47 (1965).

Appellant stresses that he engaged in the piracy of appellee's product, not only in California, but throughout the nation. His central thesis is that the scope of his activity insulates him from the application of California law. Apart from the fact that this contention is wholly at odds with *Goldstein v. California*, 412 U.S. 546 (1973),[17] record and tape piracy is illegal everywhere.[18] If it were true, as appellant argues, that California cannot give relief because the

[17] *See* pp. 14, 19 *infra*.

[18] Piracy of recordings fixed prior to February 15, 1972 violates the state law rights of the owners of the recordings *and* the federal law rights of the owners of the copyrights in the musical compositions (tune and lyrics) performed on the recordings. *See* note 9 *supra* (as to state law); pp. 19-20 *infra* (as to federal law).

scope of appellant's piracy was nationwide, the logical consequence would be that *no* state could grant such relief, even though appellant's conduct is illegal in *every* state. The absurdity of such a result is apparent. The federal structure was never intended to be a shield for illegal activity.

Moreover, appellant consented to the jurisdiction of the California courts by making a general appearance.[19] Even in the absence of appellant's consent, the California courts had jurisdiction because appellant conducted a substantial portion of his manufacturing and labeling operations in California, and offered for sale and sold his pirated records and tapes in California.

Having acquired personal jurisdiction over appellant, the California courts were empowered to grant appellee the relief which it sought. The trial court issued an injunction narrowly circumscribed to appellant's activities in, or aimed at, California. The power of a court having personal jurisdiction over a defendant to grant compensatory relief for all damages caused by the conduct of that defendant, not merely those occurring within its own border, is clear and unquestioned, Restatement (Second) of Conflict of Laws §53 (1971), and has been recognized by this Court. *New York v. O'Neill*, 359 U.S. 1, 8-9 (1959); *see also California Prune & Apricot Association v. H.R. Nicholson Co.*, 69 Cal. App. 2d 207, 224-25, 158 P.2d 764, 773 (1945).

[19] *See, e.g.*, Clerk's Transcript at 115 (minute order showing appearance in opposition to OSC re preliminary injunction), 170-85 (answer to first amended complaint).

The courts have consistently awarded plaintiffs all damages resulting from defendants' unfair competition based on all sales and have not limited damages to a specific state or geographic area.[20] Any other rule would require that a person wronged by unfair competition must institute multiple actions in every jurisdiction and prove sales which took place solely within each particular state.

Nothing in *Goldstein v. California*, 412 U.S. 546 (1973), precludes affording complete relief in one action. *Goldstein* holds that each state may, without violating the Constitution, outlaw record and tape piracy. In the absence of proof to the contrary, California presumes foreign law to be the same as its own. *Gagnon Co. v. Nevada Desert Inn, Inc.*, 45 Cal. 2d 448, 454, 289 P.2d 466, 471 (1955). Defendants did not—and cannot—identify any state in which record and tape piracy is legal. In fact, appellant's record and tape piracy was illegal in California, the forum state, in Wisconsin, appellant's domicile, and in Illinois, where appellant relocated his piracy operation in defiance of existing Illinois law.[21]

Appellant asserts that the trial court should have placed the burden of proving E-C's California sales

[20]*See, e.g., Gai Audio v. Columbia Broadcasting Systems, Inc.*, 27 Md. App. 172, 340 A.2d 736, 752 (Ct. Spec. App. 1975) (tape piracy); *Brown v. Republic Prods., Inc.*, 26 Cal. 2d 867, 868, 161 P.2d 796, 797 (1945) (accounting for profit for use of musical composition); *American Philatelic Soc'y v. Clairbourne*, 3 Cal. 2d 689, 692, 46 P.2d 135, 137 (1935) (national sale of fraudulently perforated stamps).

[21]*Mercury Record Prods., Inc. v. Economic Consultants, Inc.*, 64 Wis. 2d 163, 218 N.W.2d 705, 712 (1974), *appeal dismissed and cert. denied*, 420 U.S. 914 (1975); *Capitol Records, Inc. v. Spies*, 130 Ill. App. 2d 429, 264 N.E.2d 874 (1970). Forty-nine states have made piracy of recordings a crime. *See* Exhibits 1 and 2, annexed hereto.

on appellee.[22] Rules allocating the burden of proof in civil cases are matters of local law, not federal questions cognizable before this Court. *Lavine v. Milne*, 424 U.S. 577, 585 (1976). The decision of the California Court of Appeal, affirming the allocation of the burden of proof by the trial court, is conclusive.

No federal question is raised by appellant's challenge to the calculation of damages.[23] In substance, appellant contends that were this a federal copyright infringement case, he would have been entitled to deduct his costs incurred in connection with his piracy operations. The obvious and simple answer is that this was not a federal copyright infringement case. Rather, liability was imposed because appellant engaged in common-law unfair competition.

Appellant was not permitted to deduct his costs for two reasons, both founded solely in state law, and neither of which raises any federal question. First, the basis of his liability was that he misappropriated and sold appellee's property. Under California law, one who misappropriates the property of another is not entitled to deduct any of the costs of the transaction by which he accomplishes his wrongful conduct. *Ward v. Taggart*, 51 Cal. 2d 736, 744, 336 P.2d 534, 539 (1959); *see also* Cal. Civ. Code §2224; *Church v. Bailey*, 90 Cal. App. 2d 501, 504, 203 P.2d 547,

[22]Juris. Stmt. at 10-11. Appellant asserts that the trial court "suddenly" foisted this burden upon him during final argument. *Id.* However, *prior* to the conclusion of appellee's case in chief, the trial court adverted to this problem. Reporter's Transcript at 494-95. Having been thus forewarned, appellant bears the sole blame for his failure to develop this alleged defense.

[23]Juris. Stmt. at 18. Appellant's contention that federal copyright law governs the calculation of damages in a state common-law unfair competition case was not raised below.

549 (1949) (imposing constructive trust on proceeds of sale of another's property). Second, the trial court found that due to appellant's inaccurate and incomplete books it was impossible to verify those alleged expenses.[24]

B. The Decision of the California Court of Appeal Is in Accord With Decisions of This Court.

The decision of the California Court of Appeal, enjoining appellant's record and tape piracy in or aimed at California as unlawful, unfair competition and awarding damages for such conduct, is squarely sanctioned by *Goldstein v. California,* 412 U.S. 546 (1973) and *Kewanee Oil Co. v. Bicron Corp.,* 416 U.S. 470 (1974). In *Kewanee,* this Court expressly recognized that commercial theft threatens "the basic decency of society" and that "the state interest in denying profit to such illegal ventures is unchallengeable." 416 U.S. at 487.

Appellant's contention, that the state court has created a "national copyright", is flatly contradicted by the language of the permanent injunction. That injunction is carefully circumscribed to activities in, or aimed at, California.[25]

Appellant's claim that he has copyrighted his pirated compilations[26] attempts to raise a spurious issue. The issue here is the right of appellant to make his compilations by pirating other recordings. The issue is not whether appellant's pirated compilations are sub-

[24] *A & M Records, Inc. v. Heilman, supra,* 75 Cal. App. 3d at 570, n.11, 142 Cal. Rptr. at 400, Juris. Stmt. Appen. at 20.

[25] *See* Judgment, Juris. Stmt. Appen. at 25-26.

[26] Juris. Stmt. at 21.

ject to copyright or have been or can be copied by others.

C. Appellant's Argument That the Commerce Clause Precludes California From Enjoining Appellant's Conduct in or Aimed at California Raises No Substantial Federal Question.

Appellant asserts that the injunction violates the commerce clause by allegedly interfering with the national advertising of defendants.[27] However, all injunctive relief is limited to California. In any event, there is no *lawful* commerce, interstate or intrastate, in pirated records and tapes. *The simple fact is that an injunction against the advertisement or sale of such contraband in no way contravenes the Commerce Clause or Copyright Clause any more than would an injunction against the advertising and sale of heroin.*

Other decisions of this Court interpreting the Commerce Clause strongly support the right of California to outlaw deleterious business practices such as record and tape piracy.

In *California v. Zook,* 336 U.S. 725 (1949), this Court upheld a California statute which prohibited the arrangement of transportation over the public highways of California if the transporting carrier had no permit from the Interstate Commerce Commission. The Federal Motor Carrier Act has substantially the same provision. 336 U.S. at 726-27. This Court rejected arguments that the California statute was invalid under the Commerce Clause and held that the fact that a state law may be identical to a federal statute does not "automatically" render the state law invalid. 336 U.S. at 732.

[27] Juris. Stmt. at 19.

In *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), this Court upheld against an attack based on the Commerce Clause certain smoke abatement ordinances of the city of Detroit which had been applied to ships traveling in interstate commerce, stating that the "teaching of this Court's decisions . . . enjoin seeking out conflicts between state and federal regulation where none clearly exists." 362 U.S. at 446.

In *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963), this Court upheld a New Mexico law which had been applied to prohibit advertising which Texas optometrists had placed in a newspaper and radio station located in New Mexico, but most of whose readers and listeners were located in Texas. This Court held that "a state law may not be struck down on the mere showing that its administration affects interstate commerce in some way" and that the New Mexico legislation in question did not impinge "upon an area of interstate commerce which by its nature requires uniformity of regulation." 374 U.S. at 429. In *Goldstein*, this Court squarely held that the prohibition of the piracy of pre-1972 recordings does not require "uniformity of regulation". Since the result in *Head* was to permit New Mexico to prevent Texas residents from hearing advertisements about a Texas business, which advertisements were lawful in Texas, *a fortiori* California can enjoin appellant's advertisements for his record and tape piracy—which are unlawful *everywhere*—insofar as those advertisements are aimed at the State of California. Moreover, this case involves stolen property—pirated sound recordings—which, like contaminated or unfit produce, is "not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of

the Constitution". *Sligh v. Kirkwood*, 237 U.S. 52, 60 (1915), quoted and cited with approval in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143-44 (1970).

D. Appellant's Claim That His Record and Tape Piracy Is Protected by the Compulsory License Provisions of the Copyright Act Is Frivolous.

Appellant contends that the "compulsory license provisions" of former 17 U.S.C. §1(e) protect his record and tape piracy.[28] The argument is without merit. In *Goldstein v. California, supra*, this Court rejected this argument, 412 U.S. at 566 & n.23. Four Courts of Appeals have held that record and tape pirates do not have the right to invoke the compulsory license provisions of the Copyright Act, and in each case, this Court declined to review the decision. *Duchess Music Corp. v. Stern*, 458 F.2d 1305 (9th Cir.), *cert. denied*, 409 U.S. 847 (1972); *Jondora Music Publishing Co. v. Melody Recordings, Inc.*, 506 F.2d 392 (3d Cir.), *cert. denied*, 421 U.S. 1012 (1975); *Fame Publishing Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667 (5th Cir.), *cert. denied*, 423 U.S. 841 (1975); *Edward B. Marks Music Corp. v. Colorado Magnetics, Inc.*, 497 F.2d 285 (10th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975). In *Colorado Magnetics, supra*, this Court invited the United States to submit a brief *amicus curiae* addressing the contention that the compulsory license laws were available to record and tape pirates. The Solicitor General's brief, filed in December, 1974, cogently analyzed the reasons why it was contrary to law and policy to permit such pirates to rely on former §1(e). Thereafter, this Court *denied* certiorari.

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[28]Juris. Stmt. at 20-21.

Moreover, appellant has himself previously litigated this issue. There have been *three* determinations holding that appellant's record and tape piracy is in violation of federal law and that appellant has no rights under the compulsory license provisions of the Copyright Act. *Heilman v. Bell,* 434 F. Supp. 564, 566-67 (E.D. Wis. 1977);[29] *E-C Tapes, Inc. v. Kelly,* 412 F. Supp. 245, 248 (N.D. Ill. 1975); *Heilman v. Levi,* 391 F. Supp. 1106, 1111 (E.D. Wis. 1975).[30]

E. Appellant's First Amendment Claim Is Frivolous.

The First Amendment does not curtail the states' power to prevent the solicitation of unlawful transactions, such as sales of pirated records and tapes. In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973), a newspaper asserted a First Amendment right to print job advertisements in sex-designated column headings in violation of a local ordinance. This Court had little difficulty in rejecting that proposition:

> "Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." *Id.* at 388 (footnotes omitted).

[29] *Appeal docketed,* No. 77-1968 (7th Cir. Sept. 26, 1977).

[30] *Appeal docketed,* No. 77-1968 (7th Cir. Sept. 26, 1977).

This Court's subsequent recognition of First Amendment rights in commercial speech[31] in no way impairs the vitality of *Pittsburgh Press.* In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771-72 (1976), and again in *Carey v. Population Services International,* 431 U.S. 678, 700-02 (1977), this Court explicitly reaffirmed the power of the states to regulate commercial speech and in particular advertisements which propose illegal transactions.[32]

F. Appellant's Other Claims Raise No Substantial Federal Question.

None of the remaining arguments set forth in the Jurisdictional Statement present federal questions properly raised in the proceedings below. In the California Court of Appeal, appellant asserted that the trial court committed an abuse of discretion by precluding appellant from testifying at trial.[33] Now, for the first time, he makes the different claim that the order precluding him from testifying violated his Fourteenth Amendment rights.[34] Since the claim was not raised below, appellant cannot make the claim here.[35] In any event, appellant's

[31] *See, e.g., Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976); *Bigelow v. Virginia,* 421 U.S. 809 (1975).

[32] The cases relied upon by appellant are inapposite since neither involved the solicitation of illegal transactions.

[33] Appellant's Opening Brief at 27, *A & M Records, Inc. v. Heilman, supra.*

[34] Juris. Stmt. at 22-23.

[35] As the California Court of Appeal noted in its decision, "[A]ppellant does not claim that the trial court's order was

(This footnote is continued on next page)

claim is contrary to federal law. *See International Telephone & Telegraph Corp. v. United Telephone Company of Florida*, 60 F.R.D. 177, 186 (M.D. Fla. 1973); *Securities & Exchange Commission v. American Beryllium & Oil Corp.*, 303 F. Supp. 912, 921 (S.D.N.Y. 1969).

No federal question is raised with respect to the denial of Thomas Kells' application to be admitted as counsel pro hac vice for the corporate defendant, E-C, which never appealed. The constitutional claim is being presented for the first time in this Court, since appellant previously argued only that the ruling was an abuse of discretion.[86] Moreover, the only reference in the record to that motion is the trial court's statement that it was denied. It is appellant's duty to show that there is error and that he raised the error at all levels. He has failed to make such a showing. In any event, appellant lacks standing to assert the rights of E-C, which is not a party to this appeal. He is *not* asserting his own rights, because his liability was not predicated on an alter ego theory, but rather because of his personal participation in E-C's operations.[87]

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an inappropriate 'juristic consequence' of his assertion in discovery of his constitutional privilege against self-incrimination. [Citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1975)]." *A & M Records, Inc. v. Heilman, supra*, 75 Cal. App. 3d at 566, 142 Cal. Rptr. at 398, Juris. Stmt. Appen. at 15.

[86]Appellant's Opening Brief at 28, *A & M Records, Inc. v. Heilman, supra*.

[87]*See* Order Granting Summary Judgment on Liability and Specifying Issues Without Substantial Controversy on the Complaint, ¶¶6, 14, 16, 18, Juris. Stmt. Appen. at 45-46.

Appellant asserts, also for the first time, that the admission into evidence of facts regarding other actions pending against him denied him due process.[88] In the California Court of Appeal, he asserted only that such evidence had no relevance to this case.[89] His failure to raise this "issue" below precludes asserting it here. In any event, his claim is specious. Evidence of appellant's conduct in other states and of other cases pending against him relating to his record and tape piracy was clearly relevant to the issue of punitive damages. Such evidence demonstrated the need for an effective deterrent and also suggested an ability to pay a sizeable damage award.

Moreover, this Court cannot consider the claim that punitive damages are excessive because appellant failed properly to press that claim in the California courts by failing to raise the issue by a motion for a new trial. *A & M Records, Inc. v. Heilman, supra*, 75 Cal. App. 3d at 569, n.10, 142 Cal. Rptr. at 400, Juris. Stmt. Appen. at 19; *see also Topanga Corp. v. Gentile*, 1 Cal. App. 3d 572, 577, 81 Cal. Rptr. 863, 865-66 (1969).

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[88]Juris. Stmt. at 23.

[89]Appellant's Opening Brief at 34, *A & M Records, Inc. v. Heilman, supra*.

III

Appellant Has Failed to Comply With the Rules of This Court, in That He Has Not Shown the Manner in Which He Raised in the California Courts the Questions Presented by This Appeal. Moreover, Appellant Never Raised in the California Courts Most of the Questions He Asks This Court to Consider.

Rule 15(1)(d) of the Revised Rules of the Supreme Court of the United States provides in part:

> ". . . If the appeal is from a state court, the statement of the case shall also specify the stage in the proceedings in the court of the first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them . . . ; and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with a specific reference to the places in the record where the matter appears . . . as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court."

Appellant has not complied with any of the foregoing requirements. He has not specified when and in what manner he raised the alleged "federal questions"; nor has he described the manner in which those issues were passed upon. Non-compliance with the requirements of the Rules of the Supreme Court of the United States is, by itself, a basis for dismissing the appeal. *See* Revised Rules of the Supreme Court of the United States, Rule 16(a).

The reason for appellant's failure to comply with this Court's rules is simple: he failed properly to raise in the California courts almost all of the supposed questions he seeks to raise in this Court.

IV

There Are No Grounds for Treating the Jurisdictional Statement as a Petition for Writ of Certiorari.

28 U.S.C. §2103 (1970) requires this Court to treat the Jurisdictional Statement as a petition for writ of certiorari if it appears that appellant has "improvidently" invoked this Court's appellate jurisdiction. But there are no "special and important reasons" for this Court to hear this case. Rule 19, Revised Rules of the Supreme Court of the United States. Accordingly, there is no reason for this Court to grant certiorari.

Conclusion.

This appeal raises only settled questions of law and factual conflicts which were resolved by the California courts and is frivolous.

For all of the reasons stated in this motion, appellee respectfully urges that this Court dismiss this appeal, or in the alternative, that it affirm the decision of the California Court of Appeal.

Respectfully submitted,

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RUSSELL J. FRACKMAN,
DAVID S. GUBMAN.

EXHIBIT 1.

Statutes Proscribing Record and Tape Piracy.*

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*Amendments have been made to some of these statutes, the text of which are not available to counsel. Additionally, Wyoming has just enacted a similar statute, the text of which is not available to counsel.

STATE	EFFECTIVE DATE	TYPE OF OFFENSE	PENALTIES IMPOSED	SCOPE OF COVERAGE
ALABAMA Act 1063, Laws of 1975	November 5, 1975	Felony—Manufacture and/or distribution/ misdemeanor—Retail Sales	Felony—1st offense—Fine of not more than $25,000 and/or 1-3 years imprisonment; 2nd and subsequent offenses—Fine of not more than $100,000 and/or 3-10 years imprisonment. Misdemeanor—unclassified.	Felony—Unlawful to knowingly transfer or cause to be transferred, without the owner's consent, recorded sounds with the intent to sell same or use for profit through public performance. Also illegal to manufacture, distribute or wholesale any article with knowledge that sounds thereon are unlawfully transferred. Misdemeanor—Unlawful to retail or possess for purposes of retail any recording unlawfully manufactured or distributed.
ALASKA AS 45.51.010	July 3, 1975	Misdemeanor	A fine of not more than $1,000, imprisonment for a period of not more than one year and confiscation of the unlawful stock.	Unlawful to reproduce, sell, offer for sale or advertise for sale any sound recording, reproduced without the owner's consent. Also illegal to advertise, offer for sale or sell a recording not bearing the name and address of the manufacturer and the name of the actual artist or group.
ARIZONA 13 A.R.S. 1024	August 15, 1972	Misdemeanor	Fine of not more than $300 and/or imprisonment of not more than 6 months.	Unlawful to knowingly manufacture, distribute or retail a recording whose sounds are transferred without the owner's consent.
ARKANSAS 41 Ark. Stats. 2368-2372	February 12, 1971	Misdemeanor	Fine of not less than $50 nor more than $250.	Same as the above.
CALIFORNIA Penal Code 653H	November 13, 1968 Amended September 30, 1975	Felony/Misdemeanor	1st offense—Fine of up to $25,000 and/or up to one year in county jail or up to one year and a day in state prison. 2nd offense—fine of up to $50,000 and/or imprisonment for up to two years.	Same as the above and also illegal to transport such recordings within the state.
COLORADO Title 18 Article 4, Part 6	July 1, 1976	Felony (manufacture) Misdemeanor	Felony—Fine of not less than $1,000 nor more than $15,000 and/or imprisonment for not less than one year nor more than five years. Misdemeanor—Fine of not less than $50 nor more than $750 and/or imprisonment for not more than six months.	Unlawful to knowingly transfer, without the owner's consent, recorded sounds with the intent to sell same; unlawful to knowingly or with reasonable grounds to know, advertise, offer or possess for sale, or sell any such sound recording. Also unlawful to sell a recording not bearing the name and address of the manufacturer and the name of the actual artist or group.
CONNECTICUT Gen. Stat. Ann. 54-41 s	October 11, 1974	Misdemeanor Felony (Class D)	Fine of not more than $1,000 and/or imprisonment for not more than one year. Subsequent offense—Fine of up to $2,000 and/or not more than one year imprisonment.	Unlawful to knowingly manufacture, distribute, sell or advertise for sale a recording whose sounds have been transferred without the owner's consent. Unlawful to rent or make available equipment for such transfers.
DELAWARE Sub 3 Chapter V Title 2 Delaware Code	July 22, 1976	Felony—manufacture Misdemeanor—dealing in unauthorized duplications (A) or mislabeled recordings (c)	Felony—Fine of up to $10,000 and/or up to 7 years imprisonment. Fine of up to $10,000 plus proven damages for corporations. Misdemeanor(A)—Up to 2 years imprisonment and/or a fine of up to $1,000 for individuals or $2,000 for corporations. Misdemeanor (c)—Up to 3 months imprisonment and/or a fine of up to $500 for individuals or $2,000 for corporations.	Unlawful to knowingly transfer or cause to be transferred, without the owner's consent, recorded sounds with the intent to sell same; unlawful to knowingly or with reasonable grounds to know, advertise, offer or possess for sale, or sell any such sound recording. Also unlawful to sell a recording not bearing the name and address of the manufacturer and the name of the actual artist or group.
FLORIDA F.S.A. 543.041	October 1, 1971	Misdemeanor	Fine of not more than $500 or imprisonment of not more than 60 days.	Unlawful to knowingly manufacture, distribute, sell or advertise for sale a recording whose sounds have been transferred without the owner's consent. Unlawful to rent or make available equipment for such transfers.

STATE	EFFECTIVE DATE	TYPE OF OFFENSE	PENALTIES IMPOSED	SCOPE OF COVERAGE
GEORGIA Cr. Code 26-9938a	February 28, 1975	Felony	1st offense—Fine of not more than $25,000. 2nd offense—Fine of not more than $100,000 and/or imprisonment for not less than one or more than three years.	Unlawful to knowingly manufacture, distribute, sell or offer for sale a recording whose sounds are transferred without the owner's consent and/or which does not bear the name and address of the transferor of the sounds.
HAWAII Act 81 Laws of 1975	May 13, 1975	Misdemeanor		Unlawful to manufacture for profit a sound recording whose sounds are transferred without the owner's consent. Unlawful to knowingly sell or advertise such recordings or to make equipment available for their manufacture.
IDAHO HB 403 Chapter 76, Title 18 Iowa Code	July 1, 1976	Felony (Manufacture)/ Misdemeanor	Felony—Fine of not more than $10,000 and/or imprisonment for up to 4 years; Misdemeanor—fine of not more than $1,000 and/or imprisonment for up to six months. In addition all infringing articles and the equipment used to make them are subject to confiscation and destruction.	Unlawful to knowingly transfer without the owner's consent, recorded sounds with the intent to sell same; unlawful to knowingly, or with reasonable grounds to know, advertise, offer or possess for sale, or sell any such sound recording. Also unlawful to sell a recording not bearing the name and address of the manufacturer and the name of the actual artist or group.
ILLINOIS 38 Ill. Rev. Stat. 16-7 & 8 and 38 Ill. Rev. Stat. 43-1 & 2	August 14, 1975	Class 4 Felony/ Class B Misdemeanor	Felony—Fine of not more than $10,000 and/or 1-3 years imprisonment. Confiscation and destruction of pirated recordings. Misdemeanor—Fine of not more than $500 and/or imprisonment for not more than six months. Confiscation and destruction of pirated recordings.	Felony to knowingly manufacture, sell, offer for sale or advertise for sale recordings reproduced without the consent of the owner of the master recording or rent or make available equipment for such manufacture. Misdemeanor to manufacture, sell or otherwise deal in unidentified sound recordings (those recordings which do not provide the actual name and address of the manufacturer and the name of the performer on a prominent place on the label and outside cover or jacket.)
INDIANA I.C. 1971 35-17 Chapter 7	July 1, 1974	Misdemeanor/Felony	1st offense up to $2,000 and/or up to 1 year imprisonment. Subsequent offense—Fine up to $5,000 and/or 1-10 years imprisonment.	Unlawful to knowingly manufacture, distribute or retail a recording whose sounds are transferred without the owner's consent.
IOWA Senate file 309 Laws of 1975 (Will be part of Chapter 73 Iowa Code)	July 1, 1975	Misdemeanor	Fine of not more than $500 and/or imprisonment for not more than one year.	Same as the above and unlawful to knowingly sell or distribute recordings not bearing the name and address of the transferor of sounds.
KANSAS S.B. 855	July 1, 1976	Class E Felony (manufacturing) Class A Misdemeanor (selling and improper labeling)	For manufacturing—imprisonment for not less than one year nor more than five years and/or a fine of not more than $5,000. For selling or improper labeling not more than one year and/or a fine of up to $2500.	Unlawful to knowingly duplicate without the consent of the owner, recorded sounds with intent to sell same; unlawful to knowingly, or with reasonable grounds to know, offer for sale or distribution, or possess for such purpose any such sound recordings; unlawful to sell, offer for sale, or possess for such purpose, a recording not bearing the name and address of the manufacturer and the name of the actual artist or group.
KENTUCKY KRS. 434-445	June 20, 1974	Misdemeanor	Fine of up to $1,000 or double the amount of gain from the commission of the offense, whichever is greater, or imprisonment for up to 60 days, and fine of up to $1,000, and police may confiscate recordings produced in violation of this act.	Unlawful to knowingly manufacture, distribute or retail a recording whose sounds are transferred without the owner's consent; also unlawful to knowingly sell or distribute recordings not bearing the name and address of the transferor of sounds.
LOUISIANA LRS 14:223	January 1, 1973	Misdemeanor	1st offense—up to $1,000 Subsequent offense—up to $2,000.	Unlawful to knowingly manufacture, distribute or retail a recording whose sounds are transferred without the owner's consent.

STATE	EFFECTIVE DATE	TYPE OF OFFENSE	PENALTIES IMPOSED	SCOPE OF COVERAGE
MAINE 10 MRSA 208	November, 1975	Misdemeanor	Manufacture—Fine of not less than $500 nor more than $5,000; Advertising or sale—Fine of not less than $50 nor more than $500.	Unlawful to knowingly and willfully manufacture a sound recording whose sounds are transferred without the owner's consent. Unlawful to knowingly sell, offer for sale or advertise such a sound recording.
MARYLAND 27 MAC 467A	July 1, 1973	Misdemeanor	1st offense—up to $2,500 and/or up to 1 year's imprisonment. Subsequent offense—up to $10,000 fine and/or up to 3 years imprisonment.	Unlawful to knowingly manufacture, distribute or sell recordings whose sounds are transferred without the owner's consent, and it is also unlawful to knowingly distribute, or retail any sound recording which does not bear the actual name and street address of the transferor of sound.
MASSACHUSETTS ALM 266:143	October 31, 1973	Misdemeanor	Fine of not more than $5,000 or imprisonment for not more than 1 year.	Unlawful to knowingly manufacture, distribute or sell recordings whose sounds are transferred without the owner's consent.
MICHIGAN HB 4620	November 18, 1975	Misdemeanor	Manufacture—Imprisonment for not more than one year, or a fine of not more than $5,000, or both. Sale—Fine of not more than $100 for each offense.	Unlawful to knowingly manufacture, advertise, sell, resell, offer for sale or resale, or possess for the purpose of sale or resale recordings without the consent of the owner of the sounds.
MINNESOTA MSA 325.841-844	August 1, 1973	Felony	1st offense—up to $25,000 Subsequent offense—up to $100,000 fine and/or imprisonment of not more than 3 years.	Unlawful to knowingly manufacture, distribute or sell recordings whose sounds are transferred without the owner's consent.
MISSISSIPPI Senate Bill 2105	July 1, 1974	Misdemeanor	1st offense—up to $100 fine and/or up to 30 days imprisonment; subsequent offenses—up to $500 fine and/or 6 months imprisonment.	Unlawful to knowingly manufacture, distribute, retail or advertise a recording whose sounds are transferred without the owner's consent. Also unlawful to knowingly manufacture, distribute or sell recordings not bearing the actual name and street address of the transferor as well as the name of the actual performer.
NEBRASKA R.S. Supp. (1974) 28-1601 thru 28-1604	July 12, 1974	Misdemeanor	Fine of up to $1,000 and/or 6 months imprisonmept.	Unlawful to knowingly manufacture, distribute, sell, offer or possess for sale a recording whose sounds are transferred without the owner's consent. Also unlawful to sell, offer or posess for sale a recording not bearing the name and address of the transferor of sounds.
NEVADA N.R.S. 205.217	July 1, 1973	Felony	1st offense—Fine of not more than $5,000 and/or imprisonment for not less than 1 year nor more than 6 years. Subsequent offense—fine of not more than $5,000 and/or imprisonment for not less than 1 year nor more than 10 years.	Same as the above.
NEW HAMPSHIRE N.H.R.S.A. 352-A: 1-4 (Supp.)	November 1, 1973	Prohibited Conduct	Owner of recorded device has cause of action for treble compensatory damages and/or injunctive relief.	Prohibited to knowingly manufacture, distribute, or retail a recording whose sounds are transferred without the owner's consent and/or which does not bear the manufacturer's name and address.
NEW JERSEY A.B. 1916 signed 1/8/76	January 8, 1976	High misdemeanor—manufacture/misdemeanor—sales.	High misdemeanor—A fine of not more than $2,000 and imprisonment for not more than seven years. Misdemeanor—A fine of not more than $1,000 and up to three years imprisonment.	Unlawful to knowingly manufacture, cause to be manufactured, sell, offer for sale or advertise a recording whose sounds are transferred without the owner's consent.
NEW MEXICO 40A N.M.S.A. 16-41 thru 16-45	May 15, 1974 as amended by Laws of 1975 Chapter 335	Misdemeanor/ Felony	Felony for manufacturers and distributors up to $5,000 and/or 1 year imprisonment. Misdemeanor for retailers.	Same as the above.

STATE	EFFECTIVE DATE	TYPE OF OFFENSE	PENALTIES IMPOSED	SCOPE OF COVERAGE
NEW YORK G.B.L. 560-561	September 1, 1967	Misdemeanor	Fine of not more than $100 and/or imprisonment of up to one year.	Unlawful to knowingly manufacture or sell a recording whose sounds are transferred without the owner's consent; also illegal to manufacture or sell sound recordings without the manufacturer's name and address.
NORTH CAROLINA Chapter 14, General Statutes Article 56A	January 1, 1975	Misdemeanor	Fine of up to $500 and/or imprisonment of up to 6 months.	Unlawful to knowingly manufacture, distribute or sell unauthorized duplications of sound recordings or to record live concerts without permission. Unlawful to manufacture, distribute or sell recordings not bearing the true name of the manufacturer.
OHIO ORC 2913. 32	January 1, 1974	Felony	Imprisonment for not less than six months nor more than five years and a fine of not more than $2,500.	Unlawful to "knowing(ly) . . . practice deception in . . . reproducing any . . . phonograph record, or recording tape." Also unlawful to utter or possess with purpose to utter any recording deceptively simulated.
ORC 1333. 52	May 10, 1976	Misdemeanor	Manufacture—not more than six months imprisonment and/or a maximum fine of $1,000. Sale of unauthorized duplication or violation of labeling provisions not more than 90 days imprisonment and/or a maximum fine of $750.	Unlawful to duplicate for sale any sound recording without the consent of the owner of that recording; unlawful to knowingly sell, advertise or offer to sell such a recording. Also unlawful to manufacture or sell a sound recording not bearing the name of the artists and the name and address of the manufacturer.
OKLAHOMA 21 O.S. Supp (1975) 1865-1869	September 1, 1975	Misdemeanor/ Felony	1st offense—manufacture—up to $500. 2nd offense—manufacture—up to $25,000 and/or 2 years imprisonment. Fine of up to $500 for sale.	Unlawful to knowingly reproduce for sale without the owner's consent, sound recordings less than 20 years old. Unlawful to sell such recordings.
OREGON Chapter 747 Laws of 1973	October 5, 1973	Misdemeanor	Fine not to exceed $500 and/or imprisonment for not more than 6 months.	Unlawful to knowingly manufacture, distribute or retail or advertise for sale any sound recording which is duplicated without the consent of the owner of the original master recording.
PENNSYLVANIA 18 P.S.A. 4116	October 18, 1971	Misdemeanor—to knowingly retail or possess for purpose of retailing. Felony—to knowingly manufacture, distribute or wholesale sound recordings duplicated without the consent of the owner.	Confiscation of pirated recordings and: 1st offense—fine of not more than $5,000 or imprisonment of not more than 3 years. Subsequent offense—fine of not more than $20,000 and/or imprisonment of not more than 10 years.	Unlawful to knowingly manufacture, distribute or retail a recording whose sounds are transferred without the owner's consent and/or which does not bear the true name of the manufacturer.
RHODE ISLAND G.L. 6-13.1-15 Deceptive Trade Practices (Chapter 257, Laws of 1976)	June 9, 1976	Felony	1st offense—Fine of not more than $5,000 and/or imprisonment for not more than six years. Subsequent offense—Fine of not more than $5,000 and/or imprisonment for not more than 10 years.	Unlawful to knowingly transfer sounds and to sell, distribute, offer, or posess, for sale or distribution, any article onto which sounds have been transferred without the consent of the owner of those sounds. Also illegal to sell or distribute, offer, or possess, for sale or distribution, a sound recording not bearing the actual name and address of the transferor of sounds on its outside face.
SOUTH CAROLINA 1975 Calendar No. S. 249	January 1, 1976	Misdemeanor	1st offense—Manufacture—fine of up to $5,000 and/or imprisonment for 6 months to 2 years; subsequent offense—fine of up to $10,000 and/or imprisonment for 3-5 years. Advertisement or sale—fine of up to $1,000 and/or imprisonment for up to 1 year.	Unlawful to knowingly manufacture, distribute, sell, cause to be sold, advertise or use for profit through public performance a recording whose sounds are transferred without the owner's consent; unlawful to rent or make available equipment for such transfer.

STATE	EFFECTIVE DATE	TYPE OF OFFENSE	PENALTIES IMPOSED	SCOPE OF COVERAGE
SOUTH DAKOTA 13 S.D. Compiled Laws 43-43A	July 1, 1975	Misdemeanor—to retail/Felony—to manufacture or distribute.	Retailer—fine of not more than $500 and/or not more than 6 months imprisonment. All others—a fine of not more than $1,000 and/or not more than 3 years imprisonment.	Unlawful to knowingly manufacture, distribute, sell or offer for sale a recording whose sounds are transferred without the owner's consent and/or which does not bear the name and address of the transferor of the sounds and the name(s) of the artist(s). Also unlawful to use such recordings for profit through public performance.
TENNESSEE 7 Tenn. Ann. Code 39-4244 thru 39-4250	July 1, 1971	Misdemeanor—to knowingly retail or possess for purpose of retailing. Felony—to manufacture, distribute or wholesale sound recordings duplicated without the consent of the owner.	Confiscation of pirated recordings and: 1st offense—fine of not more than $25,000 and/or imprisonment of not less than 1 year nor more than 3 years. Subsequent offense—fine of not more than $100,000 and/or imprisonment of not less than 3 years, nor more than 10 years.	Unlawful to knowingly manufacture, distribute, retail or use for profit through public performance recordings whose sounds are transferred without the owner's consent, and/or which does not bear the name of manufacturer
TEXAS Vernon's Ann. Civ. Stat. Art. 9012	August 30, 1971	Misdemeanor/Felony	1st offense—fine of not more than $2,000. 2nd offense—fine of not more than $25,000 and/or imprisonment for not more than 5 years.	Unlawful to knowingly reproduce for sale, to sell or offer for sale a sound recording whose sounds are transferred without the owner's consent.
UTAH Unauthorized Recording Practices Act of 1973	May 8, 1973	Misdemeanor	Fine not to exceed $299 and/or imprisonment up to 6 months.	Same as above, as well as to rent or make available equipment for such transfers.
VIRGINIA 59.1 Code of Va. 41.1-41.6	July 1, 1972	Misdemeanor	Fine not to exceed $500 and/or imprisonment up to 1 year.	Unlawful to knowingly manufacture, distribute or retail a recording whose sounds are transferred without consent of the owner and/or does not bear the name of the manufacturer.
WASHINGTON 19 R.C.W. 25.020-25.040	July 25, 1974	Misdemeanor	Fine not to exceed $1,000 and/or up to 1 year imprisonment plus confiscation of tapes.	Unlawful to knowingly manufacture, distribute or retail a recording whose sounds are transferred without consent of the owner.
WEST VIRGINIA Senate Bill 220 approved 3/12/76	June 12, 1976	Misdemeanor	Fine of up to $1,000 and confiscation and destruction of unauthorized recordings and the equipment used to make them.	Unlawful to knowingly transfer without the owner's consent, recorded sounds with the intent to sell same; unlawful to knowingly, or with reasonable grounds to know, advertise, offer or possess for sale, or sell any such sound recording. Also unlawful to sell a recording not bearing the name and address of the manufacturer and the name of the actual artist or group.
WISCONSIN 943.207	June 4, 1976	Misdemeanor	Manufacturing: 1st offense—fine of not more than $2000 and/or imprisonment for not more than six months. 2nd offense—fine of not more than $8000 and/or imprisonment for not more than nine months. Sale: Fine of not more than $1000 and/or imprisonment for not more than six months.	Unlawful to knowingly transfer, without the owner's consent, recorded sounds with the intent to sell same; unlawful to advertise, sell or offer for sale such recordings with the knowledge that they have been unlawfully recorded.

STATE	EFFECTIVE DATE	TYPE OF OFFENSE	PENALTIES IMPOSED	SCOPE OF COVERAGE
Montana Sec 85-601 et seq Revised code of Montana (Chap 367, Acts of 1977)	April 14, 1977	Felony (manufacture)/ Misdemeanor (sale)	Imprisonment for up to ten years for manufacturers; a fine of up to $500 and/or imprisonment for up to six months for sellers. Also confiscation of sound recordings manufactured in violation of this section and the equipment used to make them.	Unlawful to knowingly manufacture: 1. recordings whose sounds are transferred without the owner's consent. 2. recordings of performances, live or broadcast, without the performer's consent. Unlawful to sell such recordings or to sell recordings without the name and address of the manufacturer and name of the performing artist(s)
North Dakota Senate Bill 2366 (1977)	July 1, 1977	Felony (manufacture)/ Misdemeanor (sale)	Imprisonment for up to five years and/or a fine of up to $5000 for manufacturers; imprisonment for up to 30 days and/or a fine of up to $500 for sellers. Also confiscation of sound recordings manufactured in violation of this section and the equipment used to make them.	Same as above
CONNECTICUT Gen. Stat. Ann. 53-142 b,c,d	October 11, 1974	Misdemeanor Felony (Class D)	Fine of not more than $1,000 and/or imprisonment for not more than one year. Subsequent offense--Fines of up to $2,000 and/or not more than one year imprisonment.	Unlawful to knowingly manufacture, distribute, sell or advertise for sale a recording whose sounds have been transferred without the owner's consent. Unlawful to rent or make available equipment for such transfers. Also unlawful to knowingly sell a recording not bearing the name and address of the manufacturer.

STATE	EFFECTIVE DATE	TYPE OF OFFENSE	PENALTIES IMPOSED	SCOPE OF COVERAGE
MISSOURI SB 92	September 15, 1977	Felony/Misdemeanor	First Offense -- fine of not more than $1,000 and/or imprisonment for up to six months. 2nd offense(manufacture only)imprisonment for not more than two nor less than five years	Unlawful to knowingly transfer, without the owner's consent, recorded sounds with the intent to sell same; unlawful to knowingly or with reasonable grounds to know, advertise, offer or possess for sale, or sell any such sound recording. Also unlawful to sell a recording not bearing the name and address of the manufacturer and the name of the actual artist or group.
NEW HAMPSHIRE N.H. Rev. St. Ann. Sect. 352-A: 1	August 30, 1977	Felony(for manufacture) Misdemeanor(for sale)	Imprisonment for up to seven years and/or a fine of up to $2,000 for manufacturers; imprisonment for up to one year and/or a fine of up to $1,000 for sellers. Also confiscation of sound recordings manufactured in violation of this section and the equipment used to make them.	Unlawful to knowingly manufacture: 1. recordings whose sounds are transferred without the owner's consent. 2. recordings of performances, live or broadcast, without the performers' consent. Unlawful to sell such recordings or to sell recordings without the name and address of the manufacturer and name of the performing artist(s).

STATE	EFFECTIVE DATE	TYPE OF OFFENSE	PENALTIES IMPOSED	SCOPE OF COVE.
FLORIDA F.S. 543.041	July 1, 1977	Felony/Misdemeanor	Imprisonment for up to five years and/or fine of up to $5,000 for manufacturers; imprisonment for up to 60 days and/or a fine of up to $500 for sellers. Also confiscation of sound recordings manufactured in violation of this section and the equipment used to make them.	Unlawful to knowingly manufacture: 1. Recordings whose sounds are transferred without the owner's consent. 2. Recordings of performances live or broadcast, without the performer's consent. Unlawful to sell such recordings or to sell recordings without the name and address of the manufacturer and name of the performing artist(s).

EXHIBIT 2.

Court Decisions Proscribing Record and Tape Piracy.

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UNITED STATES SUPREME COURT

Goldstein v. California, 412 U.S. 546 (1973).

CALIFORNIA

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ILLINOIS

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Gai Audio of New York, Inc. v. Columbia Broadcasting System, Inc., 27 Md. App. 172, 340 A.2d 736 (1975).

MICHIGAN

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MINNESOTA

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RCA v. Premier Albums, Inc., 19 App. Div. 2d 62, 240 N.Y.S.2d 995 (1963).

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OREGON

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SOUTH CAROLINA

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U.S. COURT OF APPEALS, SECOND CIRCUIT

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A & M Records, Inc. v. M.V.C. Distrib. Corp., No. 4-72,136 (E.D. Mich. May 22, 1975), *aff'd*, No. 76-1843-44 (6th Cir. April 7, 1978).

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FTC v. Orient Music Roll Co., 2 FTC 176 (1919).